No. 92-1745

Supreme Court, U.S.
FILED
MAR 12 1993
OFFICE OF THE CLERK

IN THE SUPPEME COURT
OF THE UNITED STATES,
OCTOBER TERM, 1992

VERNON R. JANTZ, Petitioner

v.

CLEOFAS F. MUCI, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

James S. Phillips, Sr.
PHILLIPS & PHILLIPS, CHARTERED
301 North Main, Suite 1875
Wichita, Kansas 67202
Telephone (316) 263-4610
Counsel of Record
for Petitioner

Of Counsel:
James S. Phillips, Jr.
PHILLIPS & PHILLIPS, CHARTERED
301 North Main, Suite 1875
Wichita, Kansas 67202
Telephone (316) 263-4610

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether a public school principal, who denies employment to a teacher in 1988, based on the teacher's alleged "homosexual tendencies" or homosexual status, is qualifiedly immune from liability in his individual capacity, under 42 U.S.C., section 1983.

2. Whether a public school principal is liable in his official capacity for discrimination based on sexual orientation, under 42 U.S.C., section 1983, where the school board has delegated to the principal the power to make hiring decisions without retaining the right to review the selection process carried out by the principal.

3. Whether discrimination based on sexual orientation is subject to heightened scrutiny.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this court contains the names of all parties to the proceedings in the United States Court of Appeals for the Tenth Circuit.

TABLE OF CONTENTS

Questions Presented for Review	i
List of Parties to the Proceedings in the Court Below	ii
Table of Contents	iii
Table of Authorities	iv
Statutes	vii
Miscellaneous	vii
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	3
Statement of cases	4
Reasons for Granting Writ	14
Conclusion	37

TABLE OF AUTHORITIES

CASES

Anderson V. Creighton, 483 U.S. 635, 97 L.Ed.2d 532, 107 S.Ct. 3034 (1987).....21

Ben-Shalom V. Marsh, 881 F.2d. 454, 464 (7th Cir. 1989).....34

Bowers V. Hardwick, 478 U.S. 186, 194, 106 S.Ct. 2841, 92 L.Ed.2d.140 (1986) 13,24,26,30,32,34,35

Burstyn V. City of Miami Beach, 664 F. Supp. 528, 537, (S.D. Florida 1987).....20

City of Cleburne V. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d. 313 (1985).....15,16,22

City of St. Louis V. Praprotnik, 485 U.S. 112, 99 L.Ed.2d. 107, 108 S.Ct. 915 (1988).....27,29

Doe V. Casey, 796 F.2d. 1508, (D.C. Cir 1986).....34

Doe V. Gates, 60 E.P.D. 41, 949 (D.C. Cir. 1993).....34

Harlow V. Fitzgerald, 457 U.S. 800, 818 73 L.Ed.2d. 396, 102 S.Ct. 2727 1992).....23

High Tech Gays V. Defense Ind. Sec. Clearance Office, 895 F.2d. 563 (9th Cir. 1990).....31

Islamic Center of Mississippi V. City of Starksville 840 F.2d. 293, 302, (5th Cir. 1988).....20

J.W. V. City of Tacoma, 720 F. 2d. 1126, 1129, (9th Cir. 1983).....20

Linnens V. Christensen, 646, P.ed. 1141 (Court of Appeals of Kansas, 1982.....27

Mark V. City of Chesapeake , 883 F.2d. 308, 311, (4th Cir. 1989).....20

Massachusetts V. Board of Retirement, V. Murgai, 427 U.S. 307, 49 L.Ed.2d. 520, 96 S.Ct. 2562 (1976).....36

National Gay Task Force V. Board of Education, 729 F.2d. 1270, 1273 (10th Cir. 1985).....31

Oklahoma City V. Tuttle, 471 U.S. 822, 105 S.Ct. 2435, 85 L.Ed.2d. 421 (1984).....29

Palmore V. Sidoti, 466 U.S. 429, 104, S.Ct. 1879, 80 L.Ed.2d. 421 (1984) 19,24

Pembaur V. Cincinnati, 475 U.S. 483, 106 S.Ct. 1292, and 89 L.Ed.2d. 452 (1986).....29

Pyler V. Doe, 457 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d. 520, (1983).....36

Pruitt V. Cheney, 963 F.2d. 1160, 1165, (9th Cir. 1991).....24,31,33

Rich V. Secretary of the Army, 735 F.2d. 1220, 1229 (10th Cir. 1984).....30

Sullivan V. City of Pittsburgh, 811 F.2d. 1171, 185, 3rd Cir. cert denied, 484 U.S. 849 (1987).....20

Sunday Lake Iron Company V. Township of Wakefield, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154 (1918).....18

United States Department of Agriculture V. Moreno, 413 U.S. 528, 37 L.Ed.2d. 782, 93 S.Ct. 2821 (1973).....16,18,22

United States V. Yonkers Board of Education, 837 F.2d. 1181 (2nd Cir) cert denied, 486 U.S. 1055 (1988).....20

Wauchope V. United States Department of States, 754 F. Supp. 1277, 1285, (N.D. Cal.1991).....20

Yick Wo V. Hopkins, 118 U.S. 355, 6 S.Ct. 1064, 30 L.Ed. 220 (1986).....17

STATUTES

42 U.S.C., section 1983.....3,4

MISCELLANEOUS

University of Chicago Law Review, pp. 1161, 1167 (1980).....25

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1992

VERNON R. JANTZ, PETITIONER

V.

CLEOFAS F. MUCI, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Vernon R. Jantz, the petitioner herein, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on October 9, 1992.

OPINIONS BELOW

The October 9, 1992 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 976 F.2d. 623; a copy of the original opinion is

reprinted in the Appendix . The prior decision of the United States District Court of the District of Kansas, entered on March 29, 1991, is reported at 759 F. Supp. 1543, and is reprinted in the Appendix.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on October 9, 1992. Petitioner filed a timely petition for rehearing in the Court of Appeals. The Court of Appeals denied Petitioner's Motion for Rehearing on December 14, 1992; the order denying the rehearing is reprinted in the Appendix. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves 42 U.S.C., section 1983. Said section reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or

other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Petitioner alleges a violation of his right to equal protection under the Fourteenth Amendment to the United States Constitution and brings this action under 42 U.S.C., Section 1983. Mr. Jantz contends that in 1988 respondent denied him employment as a teacher at Wichita North High School, Wichita, Kansas because respondent perceived petitioner to have "homosexual

tendencies."

Respondent was at all material times to this lawsuit principal of Wichita North High School. He was sued in both his individual and official capacities.

During the 1987-88 school year petitioner taught social studies in the Wichita public schools, including North High School, as a substitute teacher. Mr. Jantz was certified to teach social studies by the State of Kansas.

In 1987 Mr. Jantz asked the District Director of Secondary Personnel about the possibility of obtaining a full time teacher's position for the 1987-88 school year.

Mr. Jantz was interviewed by the associate principal of Wichita

North High School. However, as it turned out, no jobs became available for the 1987-88 school year. The district gave principals the responsibility for selecting teachers.

In 1988 there was an opening for a social studies position at Wichita North High for the 1988-89 school year. Petitioner was not interviewed again but was considered by respondent Muci. An individual named Mathew Silverthorne was hired by Mr. Muci instead of petitioner. Silverthorne and Jantz were the only applicants for the position. Petitioner had been recommended for the position by North High's coordinator of the Social Studies Department, William Jenkins and was highly regarded by students and

faculty.

In the 1987-88 school year Mr. Muci's secretary had suggested to him that Mr. Jantz was like her ex-husband who is gay. When petitioner was turned down in favor of Mr. Silverthorne, Mr. Jenkins asked Muci the reason petitioner was not hired. Mr. Muci's response to this inquiry, according to Jenkins, was that Jantz was not hired because of his "homosexual tendencies."

Mr. Muci did not deny he had made reference to "homosexual tendencies" of petitioner but claimed in this proceeding that Silverthorne was a superior candidate because he had coached at North High while serving as a student teacher. He asserted that such was the reason he rejected Jantz.

Muci claimed he needed the holder of the position to coach part time. Petitioner was not asked during his interview by the associate principal whether he could coach but would have responded in the affirmative if he had been asked. Petitioner had experience in basketball, soccer, baseball and tennis. Petitioner maintains that he has superior credentials to Silverthorne as regards education and experience. In the trial court Muci did not attempt to articulate a justification for denying Jantz employment on the basis of perceived "homosexual tendencies."

It should be noted that there was no evidence of homosexual conduct on the part of Mr. Jantz or public advocacy of the homosexual

life-style by him.

Petitioner had followed the prescribed procedure for applying for a full time position. When an individual applies for employment with the school district the first task of the district's central office is to determine whether the applicant is eligible for certification or is certified by the State of Kansas. When there is a vacancy the principal must notify the central office. Notices of openings are announced in the district newsletter. After an eligible individual applies for a position, he or she is requested to contact the building principal about vacant positions. The building principal is given the discretion by the district to determine whether an

individual applicant will be interviewed. If a building principal does not wish to interview someone, such decision is not reviewed by the district's central office. Building principals are not required to submit any written statements or reports concerning their interviews or their recommendations. The criteria for selection and approach used in conducting the interview are left to the sole discretion of the building principal. After the interview or interviews the building principal submits the name of the person selected by him to the central office; the building principal does not submit the names or credentials of applicants not hired. The central office is not informed of the identity of the

latter. The district's "Director of Secondary Personnel" testified that rejection of a building principal's choice by the district office "rarely" happens. The primary function of the central office is to check to make sure that the individual selected is certified in the state or eligible for certification by the State of Kansas. The district's school board makes the formal hiring decision pursuant to Kansas statutes and is the governing body of the school district.

After petitioner filed suit Mr. Muci filed a motion for summary judgment in which he argued that as regards the claim brought against him in his individual capacity he was qualifiedly immune and that with respect to the official capacity

action respondent was not granted final policymaking authority under state law and therefore said action should be dismissed. The trial court, in overruling the motion for summary judgment, held that Muci could not rely on the doctrine of qualified immunity inasmuch as there was no evidence presented by the defense of any rational basis which would justify discrimination based on alleged "homosexual tendencies". (See trial court decision which is reprinted in the Appendix). The trial court found 1that it was clearly established law in 1988 that government cannot discriminate arbitrarily without rational motivation and in effect found that there was sufficient evidence that Muci had final

policymaking authority regarding hiring decisions for purposes of deciding the motion for summary judgment.

The Court of Appeals for the Tenth Circuit reversed the District Court. (See Court's decision reprinted in the Appendix.) The Court held in effect that the defense of qualified immunity precluded petitioner's equal protection claim by reason of this Court's decision in Bowers V. Hardwick, 478 U.S. 186, 194 , 106 S.Ct. 2841, 92 L. Ed. 2d 140 (1986) The Court of Appeals embraced the view that the law in 1988 did not clearly prohibit Muci from denying employment to Jantz, because of Jantz's sexual orientation or perceived sexual orientation, without having to

establish a rational basis for such decision. The Court also held that the trial court erred in not entering summary judgment on the official capacity claim on the ground that the school board retained the right to review hiring decisions of district principals. It should be noted that as regards the official capacity claim the District Court applied heightened scrutiny to discrimination based on sexual orientation. The Court of Appeals did not reach the question of the appropriate standard for review.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals decision conflicts directly with applicable decisions of this Court as regards petitioner's claims against respondent in both his individual and official

capacities.

This case involves the question of whether governmental officials, acting in their individual capacities, have an absolute obligation to refrain from status-based discrimination unless the action is justified by a legitimate governmental purpose. A correct application of this Court's decisions related to traditional rational basis review of discrimination directed towards persons in non-suspect and non-quasi-suspect categories would have rendered such obligation applicable to Muci in 1988.

The Court of Appeals decision in this case is inconsistent with the Court's decisions in City of Cleburne v. Cleburne Living Center,

473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d. 313 (1985) and United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 37 L.Ed.2d. 782, 93 S.Ct. 2821 (1973).

Long before 1988, when Muci refused Jantz employment, the Supreme Court had established that where heightened scrutiny of the governmental classification is not appropriate, the classification must be "rationally related to a legitimate governmental interest." Moreno, 413 U.S. 528, 533, 37 L.Ed.2d. 782, 787, (1973)) (Emphasis supplied) The Court in City of Cleburne v. Cleburne Living Center, supra, stated that a governmental authority "may not rely on a classification whose relationship to an asserted goal is so attenuated as

to render the classification arbitrary or irrational".

Accordingly, in 1988, the unlawfulness of denying employment to Jantz because of irrational prejudice against persons categorized as having a homosexual orientation or status should have been "apparent" to Muci.

In this case Muci's concern about Jantz was related to unreasoning, visceral prejudice on his part.

This Court has never sanctioned governmental discrimination based on an illicit motive or public prejudice. In 1986 the court in Yick Wo v. Hopkins , 118 U.S. 355, 6 S.Ct. 1064, 30 L.Ed. 220 (1986) held that if an ordinance is "applied and administered by public authority with the

evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." This Court in Sunday Lake Iron Company V. Township of Wakefield, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154 (1918) stated the applicable rule as follows:

> "The purpose of the Fourteenth Amendment is to secure to every person within the States jurisdiction against intentional and arbitrary discrimination whether by exercise of a statute or by its improper execution through duly constituted agents."

The Court in U.S. Department of Agriculture V. Moreno, supra, held

that if the constitutional conception of 'equal protection of the laws' means anything it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." The Court in Palmore V. Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d. 421 (1984) stated as follows:

> "Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect."

Numerous lower courts have followed the above reasoning and thus have recognized that governmental discrimination is not legitimate where such results from fear or prejudice towards a particular category of persons, or from bias based on

BEST A

stereotyping. (See Sullivan V. City of Pittsburgh, 811 F.2d. 1171, 185(3rd Cir)cert denied, 484 U.S. 849 (1987); United States V. Yonkers Board of Education,837 F.2d. 1181 (2nd Cir)cert denied, 486 U.S. 1055 (1988); J.W. V. City of Tacoma, 720 F.2d. 1126, 1129, (9th Cir. 1983); Burstyn V. City of Miami Beach, 663 F. Supp. 528, 537, (S.D. Florida 1987); and Wauchope V. United States Department of State, 756 F. Supp. 1277, 1285, (N.D. Cal. 1991)) Furthermore, lower courts have recognized that where religious beliefs from the basis of the adverse action by government such beliefs do not constitute a legitimate governmental interest. (Marks V. City of Chesapeake, 883 F. 2d. 308, 311, (4th Cir. 1989); and Islamic Center of

AILABLE COPY

Mississippi V. City of Startsville, 840 F.2d. 293, 302, (5th Cir. 1988)

The Court of Appeals' decision would permit the doctrine of qualified immunity to shield governmental officials from liability even where the officials action is based on hatred, dislike, or fear of a particular group provided there is no case law specifically outlawing the precise discrimination involved. Such an approach is not consistent with this Court's requirement that governmental officials can only discriminate against persons in non-suspect or quasi-suspect categories if there is a rational basis for doing so. The said approach was not sanctioned by this Court in Anderson V. Creighton, 483 U.S. 635, 97

L.Ed.2d. 523, 107 S.Ct. 3034 (1987). In that case the Court did not require that a plaintiff must present analogous court decisions which would be factually identical or on "all fours" with the pending case. The Court, in discussing the parameters of the defense of qualified immunity stated as follows: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." The facts of this case are sufficiently analogous to the decisions in U.S. Department of Agriculture V. Moreno and City of Cleburne V. Cleburne Living Center, Inc. supra , and similar pre-1988 decisions of this court which render unlawful wholly arbitrary and

irrational discrimination by government even where heightened scrutiny is not to be applied. The Court of Appeals applies an overly narrow and technical view of qualified immunity which if accepted, would undermine the right to equal protection by categories of persons who have not been granted any special protection under the Constitution. It was unreasonable, under the objective test of Harlow V. Fitzgerald, 457 U.S. 800, 818, 73 L.Ed.2d. 396, 102 S.Ct. 2727 (1982), for Muci to have concluded that such discrimination was permissible.

The Court of Appeals in its opinion recognized that respondent had not established a rational basis for denying Mr.Jantz employment in the

record and that in general arbitrary governmental discrimination is prohibited under the equal protection clause. The Court, however, then erroneously sought to supply its own rational basis by arguing that in the absence of decisions to the contrary this Court's decision in Bowers V. Hardwick 478 U.S. 186 194, 106 S.Ct. 2841, 91 L.Ed.2d. 140, (1986) establishes a rational motivation (i.e., "the community's notions of morality") for governmental discrimination against job applicants who are gay or perceived to be gay, as a matter of law. Such interpretation is inconsistent with the equal protection analysis set forth in Palmore V. Sidoti, supra. (See Pruitt V. Cheney 963 F.2d. 1160, 1165, (9th Cir.

1991)). The Bowers decision did not involve the equal protection clause and therefore is not applicable. Furthermore, it concerns conduct not status.

Professor Sustein has noted in his article titled "Sexual Orientation and the Constitution" in 55 University of Chicago Law Review, pp. 1161, 1167 (1980) that under the equal protection clause "It is always immaterial to an equal protection challenge that members of the victimized groups are engaging in conduct that could be prohibited on a general basis." The equal protection clause, as Professor Sustein emphasized, was intended to provide judicial protection to disadvantaged groups regardless of whether society

approves or disapproves of the conduct of which members of the group participate.

The decision in Bowers V. Hardwick, supra, does not preclude a finding that forms of homosexual intimacy not proscribed by sodomy statutes should be subject to the equal protection clause. Bowers does not support the notion that "moral" disapproval of mere homosexual orientation or status provides a rational basis, under the equal protection clause, for governmental discrimination against persons classified under the heading "homosexual orientation". The Court of Appeals gives overly broad scope to the Bowers opinion in an attempt to discover a rational basis not supplied

by respondent.

The Court of Appeals' disposition of the claim brought against Muci in his official capacity is not consistent with this Court's decision in City of St. Louis V. Praprotnik, 485 U.S. 112, 99 L.Ed.2d. 107, 108 S. Ct. 915 (1988) in that the Court of Appeals found that Muci did not have final policymaking authority even though the decision under attack, i.e., the decision to reject Jantz, was not subject to review by the board given the management practice of the board which state law did not prohibit. The Kansas Court of Appeals in Linnens V. Christensen, 646 P.2d. 1141 (Court of Appeals of Kansas, 1982) held that Kansas law recognizes that local school boards are given as

"free hand as possible in the operation and organization of their school system" and that each "school board should be allowed to adopt its system to the peculiar situation existing in its district." The hiring of Silverthorne was subject to approval by the board under state law; the formal decision to hire the person whose name is submitted to the board could not be absolutely delegated. However, because the school district delegated to principals the unbridled discretion over the selection process, the board did not know the process or the criteria used by the principal in making the hiring decision or the names and qualifications of the applicants rejected or not interviewed. The school board thus

did not retain the right to review the selection process. As a result, the board was able to insulate itself from liability shutting its eyes to the actual selection process of the principal. This court held in Praprotnik that such attempt at insulation undermines section 1983 and should not be permitted.

Principals such as Muci, were granted the power to "adopt a course of action consciously chosen from various alternatives" which rendered them policymakers (see Oklahoma City V. Tuttle, 471 U.S. 822, 105 S. Ct. 2435, and 85 L.Ed.2d. 791 and Pembaur V. Cincinnati 475 U.S. 483, 106 S.Ct. 1292 and 89 L.Ed.2d. 452 (1986) Muci was not carrying out hiring policy; he was establishing

it. Respondent could exclude applicants he perceived to be gay in the absence of review or accountability; such rendered his rejection of applicants, based on his own criteria, a "final" decision.

2. Certiorari Should be Granted to Resolve Conflicts in Principle Among the Courts of Appeals.

The Court of Appeals in this case held in effect that this Court's decision in Bowers v. Hardwick, supra, had changed the law as regards the application of rational basis review to classifications which disparately affect homosexuals. The Court had, in fact, applied traditional rational basis review regarding homosexuals in Rich v. Secretary of the Army 735 F.2d. 1220, 1229 (10th Cir. 1984) and

National Gay Task Force v. Board of Education. 729 F.2d. 1270, 1273 (10th Cir., 1985) prior to 1988. One may infer that but for Bowers the Court would have held that the law of the Circuit recognizes a clearly established right of persons having a homosexual orientation or perceived homosexual orientation to equal protection of the law in the absence of a showing by the government of a rational basis for the differential treatment.

The Tenth Circuit's interpretation of Bowers is in conflict with that of the Ninth Circuit Court of Appeals in Pruitt V. Cheney. 963 F. 2d. 116. 1166 (9th Cir, 1991) and High Tech Gays V. Defense Ind. Sec Clearance Off. 895 F.2d. 563

(9th Cir. 1990) The Court in Pruitt V. Cheney stated that:

> "It should be noted that in High Tech Gays, we engaged in active rational basis review despite our conclusion that Bowers V. Hardwick 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d. 140 (1986) militated against a higher lever of scrutiny. High Tech Gays , 895 F.2d. at 573, n.9.
> Hardwick had ruled that homosexuals could not rely on a right of privacy to exempt them from criminal laws proscribing sodomy. In relying on Hardwick to negate a higher standard of equal protection review, we noted that Hardwick, like High Tech Gays, was a case relating to conduct not orientation. Hardwick is therefore, even less of a barrier to active rational basis review in this case than it was in High Tech Gays." (at p. 1166, n.5)

The Court in Pruitt v. Cheney , supra, also stated as follows:

> "It is clear, then, that in High Tech Gays, upon plaintiff's showing of discrimination, we required

> the government to establish on the record that its policy had a rational basis. The Supreme Court imposed the same requirement in Cleburne. Neither case supports the contention of the Army here, that its far more rigid discrimination against homosexuals should be held to be rational, as a matter of law, without any justification in the record." (Emphasis supplied).

The Court in Pruitt V. Cheney applied a rational basis review in considering the Navy's discharge of a homosexual. The Court held that homosexual status alone did not provide a rational basis.

The Tenth Circuit Court of Appeals decision in this case also conflicts with the Seventh and District of Columbia's Circuits' view that government must justify differential treatment of persons with

a homosexual orientation under the traditional rational basis standard of review and that Bowers V. Hardwick, supra is inapplicable for equal protection purposes even though homosexual conduct may constitutionally be criminalized. (Ben-Shalom V. Marsh, 881 F.2d. 454, 464 (7th Cir.1989); Doe V. Casey, 796 F.2d. 1508, (D.C. Cir. 1986) and Doe V. Gates 60 E.P.D. 41 949 (D.C. Cir. 1993))

3. The Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be Settled By This Court.

The Court should decide the novel question of whether homosexual status or perceived homosexual status, as distinct from homosexual conduct,

provides a rational basis, as a matter of law, after this Courts Decision in Bowers V. Hardwick, supra, for excluding persons from governmental service inasmuch as there is substantial uncertainty, as to whether, as a result of the Court of Appeals decision in this case, persons categorized as having a homosexual orientation are entitled to at least traditional rational basis review. Can government discriminate against persons simply because they are labeled as having a homosexual orientation without specifying a rational governmental purpose?

As regards the claim brought against Muci in his official capacity the issue of what should be the appropriate standard of review is

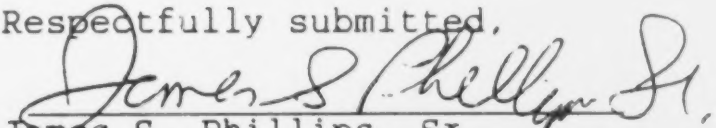
relevant given the inapplicability of the defense of good faith. The trial court correctly held that discrimination based on sexual orientation is now entitled to greater than rational basis review; that it now merits heightened scrutiny in light of the criteria set forth by the Court in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 49 L.Ed.2d. 520, 96 S.Ct. 2562 (1976) and Plyler v. Doe, 457 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d. 520 (1983). While the Court of Appeals did not directly reach this question because of its ruling on the liability of respondent in his official capacity the panel made clear that it deemed itself bound by a previous Tenth Circuit ruling that sexual orientation is not a .

suspect category. The Court of Appeals position on heightened scrutiny as regards sexual orientation, should be reviewed by this Court given the importance of the issue to millions of citizens of the United States, the development of the law in general, and the relevance of the question to the official capacity action.

CONCLUSION

Accordingly, a writ of certiorari should issue to review the judgment.

Respectfully submitted,



James S. Phillips, Sr.
PHILLIPS & PHILLIPS, CHARTERED
301 North Main, Suite 1875
Wichita, Kansas 67202
Telephone (316) 263-4610
Counsel of Record
for Petitioner

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 92-1745

Supreme Court, U.S.
FILED
MAR 12 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES,
OCTOBER TERM, 1992

VERNON R. JANTZ, Petitioner

v.

CLEOFAS F. MUCI, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

James S. Phillips, Sr.
PHILLIPS & PHILLIPS, CHARTERED
301 North Main, Suite 1875
Wichita, Kansas 67202
Telephone (316) 263-4610
Counsel of Record
for Petitioner

Of Counsel:
James S. Phillips, Jr.
PHILLIPS & PHILLIPS, CHARTERED
301 North Main, Suite 1875
Wichita, Kansas 67202
Telephone (316) 263-4610

104 pp

TABLE OF CONTENTS

Appendix A: (Court of Appeals Opinion and Judgment).....1

Appendix B: (U.S. District Court of Kansas Opinion).....38

Appendix C: (Order Denying Rehearing).....100

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VERNON R. JANTZ, Plaintiff-Appellee, vs. CLEOFAS F. MUCI, Defendant-Appellant.	No. 91-3245
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.; AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF KANSAS; NAT. CONFERENCE OF GAY AND LESBIAN ELECTED OFFICIALS, Amici Curiae.	

APPEAL FROM THE UNITED STATES DISTRICT COURT OF KANSAS
(D.C. NO. 89-1628-K)
(759 F. Supp. 1543)

David M. Rapp of Hinkle, Eberhart & Elkouri, Wichita, Kansas for Defendant-Appellant.

James S. Phillips, Jr. of Phillips & Phillips, Wichita, Kansas for Plaintiff-Appellee.

Stephen V. Bomse, Clyde J. Wadsworth, of Heller, Ehrman, White & McAuliffe, San Francisco, California, and Mary Newcombe, Los Angles, California, for amicus curiae Lambda Legal Defense and Education Fund, Inc.

Eric E. Davis, of Saperstein, Mayeda, Larkin & Goldstein, Los Angeles, California for amicus curiae National Conference of Gay and Lesbian Elected Officials.

William B. Rubenstein, Matt Coles, Ruth E. Harlow, of American Civil Liberties Foundation, New York, New York, and David J. Waxse, of Shook, Hardy & Bacon, Overland Park, Kansas, for amicus curiae American Civil Liberties Union Foundation and the American Civil Liberties Union of Kansas.

Before BALDOCK AND BARRETT, Circuit Judges, and PARKER, District Judge.*

BALDOCK, Circuit Judge.

Plaintiff-appellee Vernon R. Jantz

brought this 42 U.S.C. section

---

* Honorable James A. Parker, United States District Judge for the District of New Mexico, sitting by designation.

1983 action against Defendant-appellant Cleofas F. Muci, the former principal of Wichita North High School (Wichita North), Unified School District No. 259 (District 259), in Wichita, Kansas. Plaintiff alleges that defendant violated his Fourteenth Amendment equal protection rights under color of state law by denying him full-time employment as a social studies teacher/coach at Wichita North because of what Defendant perceived as Plaintiff's "homosexual tendencies." Plaintiff brought the action against Defendant in both Defendant's individual and official capacities. Defendant moved for summary judgment, claiming that Plaintiff had failed to place material facts in issue and that he was entitled to judgment as a

matter of law. The district court refused to grant summary judgment, and Defendant appeals. We exercise jurisdiction pursuant to 28 U.S.C. section 1291, see Pueblo Neighborhood Health Centers, Inc. v. Losavio 847 F.2d 642, 644 (10th Cir. 1988), and we reverse. The case is remanded for entry of summary judgment in favor of Defendant.

I.

Plaintiff has taught continuously since early 1987 in various District 259 schools, including some work as a substitute teacher at Wichita North. He has twice been rejected, however for full-time District 259 high school teaching positions. This case arises from his attempt to obtain a full-time position at Wichita North for the 1988-89

school year. Because of the merger of District 259 Ninth Graders into high school that year, the District created a new social studies teacher/coach position. Plaintiff interviewed for the position but was rejected in favor of Mathew Silverthorne, a recent college graduate who had student taught and coached at Wichita North. Defendant, the Wichita North principal, recommended that the District hire Mr. Silverthorne. It is undisputed on appeal that Jane Ware, Director of Secondary Personnel in District 259, actually made the employment offer to Mr. Silverthorne, but the district court found that Plaintiff had established on summary judgment that Defendant's decision not to recommend Plaintiff was an exercise

of de facto hiring authority.

Defendant argued below on summary judgment that he recommended Mr. Silverthorne because he was better qualified than Plaintiff. He also argued that he was qualifiedly immune from the claim brought against him in his personal capacity and that he did not have final policy decision making authority so as to give rise to entity liability for the claim brought against him in his official capacity. Plaintiff countered with summary judgment evidence to support his allegations that Defendant's decision resulted from prejudice against homosexuals; this; even though the record shows that Plaintiff is married, has two children, and does not claim to be homosexual or

bisexual. The summary judgment evidence came in the form of deposition testimony from Defendant's secretary, Sharon Fredin, and the director of social studies at Wichita North, William Jenkins. Ms. Fredin testified that she had remarked to Defendant sometime during the 1987-88 school year that Plaintiff reminded her of her former husband, whom she believed to be a homosexual. Mr. Jenkins testified that he knew and respected Plaintiff based on Plaintiff's substitute teaching experience and that he had recommended Plaintiff for the new position. He further testified that sometime during the fall of the 1988-89 school year he had inquired into why Plaintiff had not been hired and that Defendant had

stated that it was because of Plaintiff's "homosexual tendencies." Defendant admitted in deposition testimony that he had conveyed Ms. Fredin's remark to Mr. Jenkins, but he denied that this was his reason for not recommending Plaintiff.

In denying Defendant's motion for summary judgment, the district court held that material issues of fact existed regarding whether Defendant had violated Plaintiff's Fourteenth Amendment equal protection rights by denying employment based on a perceived homosexual classification. The court broke new ground and held that, as of 1991, the date of the decision, homosexuals and those perceived as homosexuals are a suspect class

deserving of heightened scrutiny in the equal protection context. 759 F. Supp. at 1546-51. Nevertheless, the court recognized that this new suspect classification could not possibly have been clearly established in 1988 when Defendant allegedly discriminated against Plaintiff. Id at 1552. Therefore, the court analyzed Plaintiff's qualified immunity defense under a rational basis test, holding that it was clearly established in 1988 that the government could not "'discriminate {against homosexuals} for the sake of discrimination.'" Id. at 1552 (citing Swift v. United States, 649 F. Supp 596 (D.D.C. 1986). Applying this precept as clearly established by one fellow district

court,[1] the court held that Defendant was not entitled to the qualified immunity defense because he did not offer a rational explanation for basing his hiring decision on a perception of "homosexual tendencies." Id at 1553. Furthermore, the court rejected Defendant's argument with regard to the claim against him in his

---

1. Although the district court cited only to Swift we note that earlier opinions from the 1960's by the D.C. Circuit which are consistent with Swift. See Norton v. Macy 417 F.2d. 1161 (D.C. Cir. 1969) (mere homosexual conduct not grounds for dismissal from federal employment; instead the government must show a relationship between homosexuality and a negative effect on the efficiency of the government's service)' Scott v. Macy 349 F.2d. 182 (D.C. Cir. 1965) (government's refusal to hire plaintiff on grounds that he was homosexual was insufficient basis in absence of specific evidence of misconduct and the relationship of misconduct or immorality to occupation competence or fitness.)

official capacity, noting only that Plaintiff had demonstrated on summary judgment that Defendant's failure to recommend Plaintiff for employment was consistent with an established District 259 policy of allowing school principals unchecked hiring authority and that Defendant had not adduced summary judgment evidence of the participation of any other official in the decision to reject Plaintiff. Id at 1553 (citing Jett v. Dallas Independent School District, 491 U.S. 701 (1989)).

This appeal centers on the district court's treatment of the qualified immunity issue and Defendant's argument that he did not have final policy decision making authority. We address each issue in

turn.

II.

Qualified immunity shields government officials from the burdens of lawsuits stemming from the exercise of discretionary authority, yet it also allows for the vindication of constitutional rights. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Hannula v. City of Lakewood, 907 F.2d. 129, 130-31 (10th Cir. 1990). In striking a balance between these two competing goals, the Supreme Court has formulated a test based on the "objective reasonableness" of the conduct at issue as compared with the state of the law at the time of the alleged violation. Harlow, 457 U.S. at 818; Snell v. Tunnell, 920 F.2d. 673, 696 (10th Cir. 1990), cert denied, 111

S.Ct.1622 1991). Under this test, the burdens of a trial and personal liability may not be imposed on a government official for the exercise of discretionary authority unless his conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. This "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

Qualified immunity differs from other affirmative defense in that it protects the defendant from "the burdens associated with trial" as well as from personal liability. Pueblo Neighborhood Health Centers, 847 F.2d. at 645; Hannula 907 F.2d at 131.

Therefore, our review of the district court's summary judgment determination differs from the norm. Hannula, 907 F.2d.at 130. A defendant government official need only raise the qualified immunity defense to shift the summary judgment burden to the plaintiff. Id. This burden is quite heavy, id at 131, for the plaintiff must do more than simply allege the violation of a general legal precept. Anderson v. Creighton, 483 U.S. 635, 639-40 1987). The Plaintiff must"instead demonstrate a substantial correspond-ence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hannula, 907 F.2d. at 131. "The contours of the right must be sufficiently clear that a reasonable

official would understand that what he is doing violates that right." Anderson, 483 U.S. at 640. Clearly this standard does not require a precise factual analogy to pre-existing law; however, the plaintiff must demonstrate that the unlawfulness of the conduct was "apparent" in the light of pre-existing law. Id. Once the plaintiff meets his burden of coming forward with facts or allegations which demonstrate that the defendant's alleged violation should have been apparent in light of pre-existing law, the "defendant assumes the normal burden of a movant for summary judgment of establishing that no material facts remain in dispute that would defeat her or his claim of qualified immunity." Powell v.

Mikulecky, 891 F.2d. 1454, 1457 (10th Cir. 1989).

Applying the qualified immunity analysis to this case, we must determine whether Plaintiff has met his burden of demonstrating that Defendant's alleged conduct violated clearly established law of which a reasonable person would have been aware in 1988. Plaintiff contends that clearly established Fourteenth Amendment equal protection principles prohibited state and local officials from arbitrarily discriminating against homosexuals when Defendant refused to recommend him for the new social studies teacher/coach position at Wichita North in 1988. The district court agreed with this assertion, relying solely on United

States v. Swift 649 F.Supp. 596 (D.D.C. 1986). 759 F. Supp. at 1553. In Swift, the District Court for the District of Columbia held that "the government may not discriminate against homosexuals for the sake of discrimination, or for no reason at all." 649 F. Supp. at 602. By way of analogy, the district court in this case held that the government may not arbitrarily discriminate against "perceived homosexuals" either. 759 F.Supp at 1553.

On appeal, Plaintiff goes beyond Swift, relying primarily on a general discussion of equal protection principles. For qualified immunity purposes only, he concedes, as the district court recognized, that government classifications based on

sexual orientation were neither inherently suspect nor quasi-suspect as a matter of clearly established law in 1988. He concedes the same with regard to fundamental rights. Therefore, he does not discuss the higher levels of scrutiny applied to government actions which disparately affect such classes and rights.

Nevertheless, Plaintiff argues that Defendant's actions could not withstand the clearly established rational basis review applied to government classifications which do not call for higher levels of scrutiny. He cites United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) in which the Supreme Court held that a provision of the Food Stamp Act which was designed

to prevent hippies from participating in the Food Stamp Program could not withstand traditional rational basis review under a Fifth Amendment equal protection. Id, at 533-34. The Moreno Court noted that "(f) or the constitutional conception of 'equal protection of the laws' to mean anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. at 534. Plaintiff also cites Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446-47 (1985), in which the Court applied the same principle under a Fourteenth Amendment equal protection analysis of a classification which disparately affected retarded

citizens. We take it as given that the Moreno and Cleburne references to Congressional desire to harm an unpopular group apply also to a school administrator's decision to deny employment to an applicant. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) (State cannot conclude person from occupation in contravention of Fourteenth Amendment Equal Protection clause). See also Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (Equal Protection clause applies to discriminatory administration of facially neutral statute). Accordingly, Plaintiff contends that Defendant's bare desire to harm homosexuals by denying him the full-time position at Wichita North violated equal protection principles

clearly established in Moreno and Cleburne.

Plaintiff stresses that Defendant did not offer a rationale in district court for denying him a full time position based on a perceived homosexual status. Therefore, Plaintiff argues, the decision was per se invidious discrimination against homosexuals in violation of the general principles established in Moreno and Cleburne.[2] Plaintiff

---

2. The district court agreed, although it relied only on Swift.: The present case provides no indication of any justification for the defendant's determination to discriminate on the basis of sexual orientation, nor, as the court has noted earlier , has the defendant attempted to supply one . . . . Accepting as true the evidence offered by the Plaintiff, as the court must under the relevant standards of review, the defendant acted arbitrarily, without any rational purpose, based upon personal prejudice

misapplies the qualified immunity standard, however. It was not Defendant's burden to demonstrate that his alleged conduct did not violate clearly established law. Rather it was plaintiff's burden "to demonstrate a "substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hannula 907 F.2d. at 131. Rather than a survey of the generalized rational basis test as applied in Moreno and Cleburne we think the "substantial correspondence" test at a minimum

---

2. against homosexuals.

759 F. Supp. at 1553 (citing Swift, 649 F. Supp. at 602).

requires an examination of how courts have treated classifications affecting homosexuals, for the unlawfulness of the alleged activity must be "apparent" in light of pre-existing law before Defendant can be forced to endure the burdens associated with trial.

Examining the case law as it existed in 1988, we do not find a clearly established line of authority prescribing an adverse action against civilian job applicants based on homosexual or perceived homosexual orientation. In 1985, Justice Brennan aptly described the state of the law in this area: "whether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be

advanced to permit their infringement, are important questions that this Court has never addressed, and which have left lower courts in some disarray." Rowland v. Mad River Local School District, 470 U.S. 1009, 1015-16 (1985) (Brennan, J., dissenting from the denial of certiorari). The appeals court in Rowland reversed a jury verdict in favor of a bisexual high school guidance counselor who had been discharged from employment because she had expressed her sexual orientation. Regarding her equal protection claim, the appeals court reversed on plain error grounds because she failed to present "evidence of how other employees with different sexual preferences were treated". 730 F.2d 444, 450 (6th Cir.

1984). Justice Brennan viewed this holding as a transparent effort to evade the central question in the case: "may a State dismiss a public employee based on her sexual status alone?" 470 U.S. at 1011. Justice Brennan further noted that the court of appeals had answered this question in the affirmative by reversing the jury's verdict. Id at 1017-18.

Soon after Justice Brennan's dissent from the denial of certiorari in Rowland the Court held in Bowers v. Hardwick, 478 U.S. 186, 194 (1986) that homosexual sodomy was not a fundamental right under a Fourteenth Amendment substantive due process analysis. Plaintiff argues that Hardwick is inapposite because it dealt with a substantive due process

analysis whereas his claim is based on the equal protection clause. For purposes of qualified immunity, however, we need not decide how Hardwick affects equal protection claims; we need only note that courts have reached differing conclusions on the issue. See e.g., Ben-Shalom v. Marsh, 881 F.2d. 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.") cert. denied, 494 U.S. 1004 (1990); Woodward v. United States 871 F.2d. 1068, 1076 (Fed. Cir. 1989) ("After Hardwick it cannot logically be asserted that discrimination

against homosexuals is constitutionally infirm."), cert. denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d. 97, 103 (D.C. Cir. 1987) (" There can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."). But see Pruitt v. Cheney, 963 F.2d. 1160, 1166 n.5 (9th Cir. 1992) (reviewing status-based discrimination against homosexuals under an active rational basis review, distinguishing Hardwick as conduct based on discrimination; High Tech Gays v. Defense Indust. Security Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (same).

Plaintiff argues that even though the cases interpreting Hardwick have reached differing results on the level

of scrutiny applied to classifications based on homosexual conduct or status, each court applied at least the minimal rational basis test of Moreno and Cleburne. We agree, and prior to Hardwick we twice applied rational basis review to classifications which disparately affected homosexuals. See Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984); National Gay Task Force v. Board of Edu., 729 F.2d 1270, 1273 (10th Cir. 1984), aff'd by an equally divided court, 470 U.S. 903 (1985).[3] The Supreme Court,

---

3. Given our disposition of this case on immunity grounds, we need not address the district court's holding that classifications based on homosexual status as opposed to homosexual conduct are inherently suspect. 759 F. Supp. at 1546-51. We note, however, that the court failed to cite Rich, in which we held that a status-based classification was not inherently suspect. Were we to have the issue before us, we would not be entitled as a three-judge panel to overrule circuit precedent. United States v. Spedalieri, 910 F.2d 707, 710 n.3 (10th Cir. 1990)

however, held in Hardwick that the community's notions of morality were sufficient to provide a rational basis for the statute. Id. at 196 See also Barnes v. Glenn Theater, Inc. 111 S.Ct.2456,2468 (1991)(Scalia,J., concurring)("In Bowers,we held that since homosexual behavior is not a fundamental right, a Georgia law prohibiting private homosexual intercourse needed only a rational basis in order to comply with the Due Process Clause. Moral opposition to homosexuality, we said, provided that rational basis.") Although the Hardwick Court did not deal with an equal protection claim, for qualified immunity purposes we think its holding, and the general state of confusion in the law at the time,cast enough shadow on the area so

that any unlawfulness in Defendant's actions was not "apparent" in 1988. And we do not find Swift, 649 F.Supp. 596, which formed the basis of the district court's holding in this case, to clarify the law. Therefore, we hold that Defendant is entitled to qualified immunity.

III.

At issue next is whether Defendant may be held liable--i.e. whether District 259 may be held liable--for damages resulting from the suit brought against him in his official capacity.[4] Section 1983

4. Plaintiff's official capacity action against Defendant is in reality an action against District 259, and District 259 has had notice and an opportunity to respond. See Kentucky v. Graham, 473 U.S. 159, 165 (1985) ("As long as the government entity receives notice and opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.") District 259 may not plead qualified immunity. See Owen v. City of Independence, 445 U.S. 622 , 657 (1979)

liability for the single act of an employee may not be imposed on a local government entity under a respondeat superior theory. Monell v. City of New York Dept. of Social Services, 436 U.S. 658, 694 (1978). Rather such liability may be imposed only if the employee possesses "final authority" under state law to establish policy with respect to the challenged action. See Jett v. Dallas Indep. School Dist., 491 U.S. 701, 736-38 (1989) City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 481-84 (1986); Ware v. Unified School District No. 492, 902 F.2d 815, 817 (10th Cir. 1990.) Whether Defendant possessed such "final authority" is a question of

state law. Ware , 902 F.2d at 817. We review the denial of summary judgment on this issue under the same standard as the district court. Osgood v. State Farm Mut. Auto Ins. 848 F.2d 141, 143 (10th Cir. 1988) Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . . the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P.56(c).

This issue is controlled by our decision in Ware. In Ware we interpreted Kansas law and held that final hiring authority in the Kansas school system rests in the school boards. 902 F.2d at 818 (citing Kan. Stat. Ann section 72-8202C (1985) Furthermore, we held that the school boards had no statutory authority to

delegate hiring authority to subordinates. Id. (citing Hobart v. Board of Educ. of Unified School Dist. No. 309, 230 Kan. 375, 634 P.2d 1088, 1094 (1981)). Therefore in this case it is beyond dispute that Defendant, as principal of Wichita North, did not have "final authority" under Kansas law to hire teachers. In Ware however, we noted "that lawfully empowered decisionmakers cannot insulate themselves from liability under section 1983 by knowingly allowing a subordinate to exercise final policymaking authority vested by law in the decisionmakers." Id. (citing Praprotnik, 485 U.S. at 126-27.) (emphasis in original). This type of delegation "arises when a subordinate's decision is couched as a

policy statement expressly approved by the policymaking entity, or when the decision manifests a custom or usage of which the entity must have been aware." Id (citing Praprotnik, 485 U.S. at 130). Plaintiff does not contend that Defendant's decision was couched in terms of a policy statement. Rather, he contends that District 259 delegated hiring authority to Defendant by "custom or usage," noting that the district court found that Defendant and other principals had virtual de facto hiring authority. The district court anchored its summary judgment determination on this finding, although it did not discuss Kansas law. 759 F. Supp. at 1553.

The district court noted

that "ultimate hiring decisions rarely conflict with the decision of the school principals (in District 259)." Id "Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy." Praprotnik 485 U.S. at 130. Delegation must be absolute to give rise to the "final authority." If the board retains the authority to review, even though it may not exercise such review or investigate the basis of the decision, delegation of final authority does not occur. See id. See also Williams v. Butler, 863 F. 2d 1398, 1402 (8th Cir 1988) ("A clear message from Praprotnik is that an incomplete delegation of authority--i.e., the right of review is

retained--will not result in municipal liability, whereas an absolute delegation of authority may result in liability on the part of the municipality."), cert. denied, 492 U.S. 906 (1989); Worsham v. City of Pasadena, 881 F.2d 1336, 1341 (5th Cir. 1989) (citing Williams v. Butler). The uncontroverted record on summary judgment in this case demonstrates that the Board retained the right to review hiring decisions made by District 259 principals, including Defendant. See 759 F. Supp. at 1553 ("The principal's discretion in hiring is not unfettered."). Therefore, we do not find a delegation of policymaking authority. Summary judgment should have issued in favor of Defendant on the official capacity

claim.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VERNON R. JANTZ, Plaintiff,	)	
vs.	)	No. 89-1628-K
CLEOFAS F. MUCI, Defendant,	)	

MEMORANDUM AND ORDER

Plaintiff Vernon Jantz has brought the present action under 42 U.S.C. section 1983 alleging a violation of his right to equal protection. The plaintiff alleges that he was denied by the defendant, then-school principal Cleofas Muci, employment as a public school teacher on the basis of Muci's perception that Jantz had "homosexual tendencies." The defendant has now moved for summary judgment.

Arguments relating to the defendant's motion were presented to the court in a hearing conducted March 21, 1991. Consistent with the views of the court expressed during the course of the hearing, and for the reasons addressed herein, the court hereby grants in part, and denies in part, the defendant's motion for summary judgment.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). In considering a motion for summary judgment, the court

must examine all evidence in a light most favorable to the opposing party. McKenzie v. Mercy Hospital, 854 F.2d 365, 367 (10th Cir. 1988). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. Ellis v. El Passo Natural Gas Co., 754 F.2d 884, 885 (10th Cir. 1985). The moving party need not disapprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. Dayton Hudson Corp. v. Macerich Real Estate Co. , 812 F.2d 1319, 1323 (10th Cir. 1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or

briefs. Rather, the non moving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegations. Anderson v. Liberty Lobby Inc. 477 U.S. 242, 256 (1986). Once the moving party has carried its burden under Rule 56(c) the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the non moving party must come forward with specific facts showing that there is a genuine issue for trial.'" Matsushita Elect. Indus. Co. Ltd. v. Zenith Radio Corp, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P.56(e)) (Emphasis in

Matsushita). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. Cleotex Corp v. Catrett, 477 U.S. 317 (1986)

Vernon Jantz graduated from high school in Newton, Kansas in 1963. He graduated cum laude from Wichita State University, receiving a bachelor's degree from Wichita State University in 1972 and a master's degree in 1978. After serving in the United States Air Force, Jantz completed course work in secondary education at Western New Mexico State University, and obtained a New Mexico secondary school teaching permit in

1985.

During the 1985-86 school year, Jantz taught social studies in the New Mexico schools. Jantz and his wife moved to Wichita, Kansas in the summer of 1986, Obtaining Kansas certification in September, 1986, Jantz took employment with Unified School District No. 259 and began substitute teaching for the district in early 1987. Jantz substituted at several middle and elementary schools in the district, including Wichita North High School.

During this time, Jantz did no coaching. In his interviews with school administrators, including an interview conducted by a Wichita North administrative officer on behalf of Muci, Jantz did not volunteer to

perform coaching activities. By the same token, Jantz was not asked whether he was able and willing to assume coaching responsibilities. Jantz, who had experience in basketball, baseball, soccer, and tennis, was able to coach, and would have done so had he been asked.

In May, 1987 Jantz contacted the district's Director of Secondary Personnel, Frank Crawford, and inquired about the possibility of obtaining a teacher' s position for the 1987-88 school year. Despite his talk with Crawford, it remained uncertain whether there were any openings for the upcoming school year. Jantz interviewed at Wichita South and at Wichita North (with associate principal Milford Johnson). However,

as it turned out, no positions were open for the 1987-88 school year at the schools where Jantz interviewed. As with the previous year, Jantz provided substitute teaching services during the 1987-88 school year.

Jantz met with Crawford's successor, Jane Ware, in February 1988. Due to the upcoming merger of ninth grade students into Wichita high schools a combined social studies teacher and coach position was created at Wichita North for the 1988-89 school year. Jantz applied for the position.

The contentions of fact presented by the parties establish that the principals of the individual schools in the district exercise de facto the predominate role in hiring

decisions, with some input by the district personnel office. The principal usually conducts the job interview with any applicant and his determination is normally decisive.

Jantz's application was turned down and Matthew Silverthorne was selected to fill the new position. The parties dispute the reason for this decision by Wichita North's principal, Cleofas Muci. Muci was principal of Wichita North for the 1986-87 and 1987-88 school year. Muci retired in November, 1988.

According to Muci, he hired Silverthorne because he was the best candidate. Silverthorne had student taught and coached at Wichita North. In Muci's opinion, Silverthorne had done a good job while coaching.[1]

1. The defendant alleges at p.9 of

Silverthorne was certified to teach social studies (with the exception of world geography, in which he had only a provisional certification).

Jantz disputes this version of the decision to hire Silverthorne. Jantz cites the testimony of Sharon Fredin (Muci's secretary) and William Jenkins (the coordinator of social studies at Wichita North). Fredin has acknowledged in her deposition that during the 1987-88 school year she "made the offhand comment" to Muci that Jantz reminded her of her husband, whom she believed to be a

---

1. his reply brief, that Silverthorne was an "avid" coach who volunteered for coaching assignments. The cited portion of Muci's deposition testimony establishes neither point, only that he performed his coaching responsibilities well.

homosexual. Jenkins has testified that when he asked why Jantz was not hired for the new position, Muci told him it was because of Jantz's "homosexual tendencies."

After being denied the social sciences position at Wichita North, Jantz worked during the 1989-90 school year as a (half-time) social studies teacher and a (half-time) facilitator for the gifted students at Jardin Middle School. Jantz currently is employed full-time as a facilitator for gifted students at Hadley Intermediate School. Jantz is a 45-year-old white male. He is married with two children.

The positions of the parties are diametrically opposed and under the rules of summary judgment the

court must accept the plaintiff's version as correct. Defendant Muci makes several arguments seeking to contradict the plaintiff's version: he stresses Jenkins misspelling of Muci's name in his affidavit, suggests that his ex-secretary Fredin's "recollection is questionable," and generally denies any discriminatory intent against homosexuals. Muci also spills a great deal of ink in his briefs arguing from the premise that Muci simply made a professional, good faith selection of the candidate he believed to be the better qualified.

The problem, of course, is that the rules of summary judgment do not allow such a premise. Under those rules, Jantz's version of the events leading to the selection of

Silverthorne must be taken as true. Muci is entitled to argue his version to the jury at the trial of the present matter, but for purposes of resolving the present motion for summary judgment, the court must accept as true that the real reason for the failure to hire Jantz was Muci's belief that Jantz had "homosexual tendencies."

The court concludes that Jantz has articulated a claim which, if proven at trial, sets forth a violation of his constitutional rights under 42 U.S.C. section 1983. "The time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectible interests." Acanfora v. Board of Educ. 359 F. Supp. 843, 851

(D. Md. 1973), aff'd on other grounds 491 F.2d 498 (4th Cir.); cert denied, 419 U.S. 836 (1974) The court will address Jantz's equal protection claim under two potentially relevant standards. The court will discuss the claim in the context of both a heightened scrutiny analysis, and in the additional context of the potential arbitrary and capricious nature of the classification. The court will then address the defendant's claim to qualified immunity as it relates to both the heightened scrutiny and rational basis analyses.

Heightened Scrutiny

In Bowers v. Hardwick, 478 U.S. 186 (1986) the Supreme Court held that the due process clause of the

Fourteenth Amendment does not prohibit the states from criminalizing homosexual sodomy. That case cited by defendant Muci, is not directly relevant here. The Bowers Court only addressed the respondent's claim that the Georgia statute was a violation of due process; equal protection was not in issue. The case presented the limited issue of whether homosexual conduct could be regulated by the states. Whether a state or its agents may discriminate among citizens on the basis of their sexual orientation was not at issue.

The distinction between conduct and orientation is both proper and useful in analyzing the constitutional rights of homosexuals. See Sunstein, Sexual Orientation and

the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U.Chi.L.Rev. 1161, 1162 (1988). Due process which was at issue in Bowers, serves as a limitation of majoritarian restrictions of traditionally favored and sanctioned activities and rights; it necessarily focuses on historical practice and tradition. Equal protection, on the other hand, protects disadvantaged groups of individuals from governmental discrimination, even where the discrimination is enshrined in a deep historical tradition. Id at 1163, 1170-74. Bowers merely established that homosexual conduct was not a recognized historical liberty. The case does not deal with the issue of

whether societal bigotry against private homosexual orientation or tendencies legitimizes governmental discrimination against homosexuals under equal protection. See John Charles Hayes, The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick, 31 B.C.L. Rev. 37[illegible] (1990) Indeed, as Judge Norris recognized in his concurring opinion in Watkins v. United States Army, 875 F.2d 699, 711 (9th Cir. 1989) (Norris J., concurring in the judgment), cert. denied, ___U.S. ___, 111 S.Ct. 384, 112 L.Ed.2d 395 (1990), the strength of the historical tradition of discrimination against homosexuals documented by the Supreme Court in

Bowers, while supporting the denial of the due process claim in that case, in fact supports the view that governmental discrimination on the basis of sexual orientation may represent a violation of equal protection considerations.

> It is perfectly consistent to say that homosexual sodomy is not a practice so deeply rooted in our traditions as to merit due process protection, and at the same time to say, for example, that because homosexuals have historically been subjected to invidious discrimination laws which burden homosexuals as a class should be subjected to heightened scrutiny under the equal protection clause. Indeed, the two propositions may be considered complementary: In all probability, homosexuality is not considered a deeply-rooted part of our traditions <u>precisely because</u> homosexuals have historically been subjected to invidious discrimination.

<u>Id</u> at 719 (emphasis in original).

The distinction between conduct and orientation may be seen in the cases decided by lower federal courts which have discussed the appropriate standard for review of governmental discrimination against homosexual activity. Decisions which have refused to impose a heightened scrutiny analysis have done so with an emphasis that persons engaging in homosexual conduct do not constitute a suspect class. See High Tech Gays v. Defense Industr. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (challenged regulations "all relate to conduct" rather than orientation); Padula v. Webster, 822 F.2d 97 (D.C. Cir 1987) (homosexual orientation not resulting in homosexual conduct not in issue); National Gay Task Force v.

Board of Education, 729 F.2d 1270 (10th Cir. 1984), aff'd by an equally divided court, 470 U.S. 903 (1985) (teachers could be fired for "engaging in an indiscreet public act of oral or anal intercourse"); Singer v. United States Civil Service Com'n, 530 F.2d 247 (9th Cir. 1976).[2]

Bowers however, provides no bar to the use of heightened scrutiny when analyzing governmental discrimination based upon sexual orientation. However, in identifying which governmental classifications require heightened scrutiny analysis,

---

2 One Circuit has abandoned explicitly the distinction between orientation and conduct which has been stressed in other cases. In Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, ___ U.S.___, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990), the Seventh Circuit held, without any evidence in the case before it, and without citation to any authority of any kind, that the plaintiff's admitted lesbian orientation compelled

the Supreme Court, in a series of cases, has identified several considerations which are relevant. The discrimination must be invidious and unjustifiable, that is, discrimination based upon obvious, immutable, or distinguishing trait which frequently bears no relation to ability to perform or contribute to society. A second factor is whether the class historically has suffered from purposeful discrimination. Third and finally, the class must lack the political power necessary to obtain protection from the political branches of government. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985); Plyler v. Doe, 457 U.S. 202, 216 n.14, 219-23 (1982);

---

2. the "reasonable inference" that she "has in the past and is likely to again engage in such conduct.

"Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Indep. School Dist. V. Rodriguez, 411 U.S. 1, 28 (1973); Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973).

In denying heightened scrutiny to discrimination against homosexuals, two circuit courts have found that homosexuality was not an immutable characteristic.[3]

---

3. In High Tech Gays v. Defense Indus. Sec. Clearance Office 895 F.2d 563, 573 (9th Cir. 1990), the Ninth circuit, without citation to any evidence in the record to a single medical authority, announced that: "homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes." In Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), the Federal Circuit also opined that "members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in character." As with the Ninth Circuit in High Tech Gays, the court offered not the slightest support or authority for the position that homosexuality is a mutable characteristic.

In both cases, the findings were made without the benefit of any supporting authority, and were barren of any cited scientific or medical authority which would lend support to such conclusions. Nor did the courts cite in evidence in the records before them, instead simply intoning that homosexual orientation was not immutable.

This, of course is hardly surprising, in view of the overwhelming weight of currently available scientific information. According to that information, sexual orientation (whether homosexual or heterosexual) is generally not subject to conscious change.[4] Sexual

---

4. See Coleman, "changing Approaches to the Treatment of Homosexuality ," in Homosexuality: Social,

orientation becomes fixed during early childhood, "it is not a matter of conscious or controllable choice." High Tech Gays v. Defense Ind. Clearance Off. 909 F.2d 375(9th Cir 1990) (En banc)(Canby,J.,dissenting)Judge Norris has put the issue in terms the ordinary person (whether heterosexual or homosexual) can appreciate. If the

---

4. Psychological, and Biological Issues, 81-88 (W.Paul, J. Weinrich, J. Bonsiorek & M. Hotvedt Eds 1982); A. Bell, M. Weinbert, & F. Hammersmith, Sexual Preference--Its Development in Men and Women,166-67,211,222(1981); McConaghy, Is a Homosexual Orientation Irreversible? 129 Brit. J. Psychiatry, 556, 563 (1976); Acosta, Etiology and Treatment of Homosexuality, 4 Arch. Sexual Behavior, 9, 23-24 (1975) ; C. Tripp, The Homosexual Matrix, (1975) ; Ross & Stalstorm, Arch.Exorcism as Psychiatric Treatment: A Homosexual Case Study, 8, Arch. Sexual Behavior, 379 (1979) Additional authorities are cited in Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality 57 S.Cal.L.Rev.797, 819-21.

government began to discriminate against heterosexuals, how many heterosexuals "would find it easy not only to abstain from heterosexual activity but also shift the object of their desires to persons of the same sex?" Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., Concurring.).

Aside from the available scientific evidence, which strongly supports the view that sexual orientation is not easily mutable, complete and absolute immutability simply is not a prerequisite for suspect classification.[5] Race, gender alienage, and illegitimacy can all be changed, yet discrimination on the

---

5. In listing the factors relevant to

basis of any of these categories compels heightened scrutiny by the courts. Aliens may obtain citizenship, gender may be altered by surgery, lighter-skinned blacks may pass as white. Discrimination on the basis of race would not become permissible merely because a future scientific advance permits the change in skin pigmentation.

The consideration of the mutability of a personal trait which is the subject of governmental discrimination serves a more general

---

5. the determination that a governmental classification is suspect, the Supreme Court has omitted citing immutability as a requirement on several occasions. City of Cleburne v. Cleburne Living Center 473 U.S. 432, 440-41 (1985); Massachusetts Bd. of Retirement v. Murgia 427 U.S. 307, 313 (1976); San Antonio School Dist v. Rodriguez, 411 U.S. 1, 28, (1973).

purpose, indicating the existence of particularly heinous and reprehensible forms of discrimination. While traits such as race, gender, or sexual orientation may be altered or concealed, that change can only occur at a prohibitive cost to the average individual. Immutability therefore defines traits which are central, defining traits of personhood, which may be altered only at the expense of significant damage to the individual's sense of self. See L. Tribe, American Constitutional Law section 16-33 at 1616 (1988) (sexual orientation, whether homosexual or heterosexual, is central to the personality of the individual); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect

Classification, 98 Har. L. Rev. 1285, 1303 (1985) Watkins v. United States Army, 875 F.2d at 726 (sexual orientation serves as "a central aspect of individual and group identity")

In this context, classification on the basis of sexual orientation fulfills the concern that the identifying trait of the class be immutable. Sexual orientation is a trait which is not subject to voluntary control or change. More importantly, to discriminate against individuals who accept their given sexual orientation and refuse to alter that orientation to conform to societal norms does significant violence to a central and defining character of those individuals.

Discrimination on the basis of sexual orientation is invidious. In addition to the immutable nature of the trait, homosexual individuals have been and are the subject of incorrect stereotyping. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729-30 (1982) (invalidating discrimination based on stereotype of what constitutes acceptable female work). Homosexual orientation "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Resolution of the American Psychological Association (Jan. 1985). Nor does homosexual orientation alone impair job performance, including the job of teaching in public schools. Acanfora

v. Board of Educ., 359 F. Supp. at 851. See also Norton v. Macy 417 F.2d 1161 (D.C. Cir. 1969) As a class-defining trait, sexual orientation "bears no relation to ability to perform or contribute to society." Frontiero v. Richardson, 411 U.S. 686.

Yet homosexuals remain the subject of significant and virulent stereotyping in modern society. Homosexuals are believed to be effeminate (if gay) or masculine (if lesbian), they are believed to proselytize children to homosexuality or indeed seek out children to molest, they are believed to be mentally ill; stereotypes which are all demonstrably false. See Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications

based on Homosexuality, 57 S. Cal.L.Rev.797, 821-24 (1984) In truth, the sexual orientation of the vast majority of homosexuals is not identifiable on the basis of mannerism alone. Marmor, "Clinical Aspects of Male Homosexuality," in Homosexual Behavior: A Modern Reappraisal 267 (Marmor ed. 1980) Homosexuals are no more likely to molest children than are heterosexuals. Id. at 271; State of Oregon Dept of Human Resources, Final Report of the Task Force on Sexual Preference, 21 (1978) Homosexuals are not mentally ill. "The National Association for Mental Health, the American Psychiatric Association, and the Surgeon General now agree that homosexuality in and of itself, is not a mental illness." 57

S.Cal.L.Rev. at 824.

In addition to the invidiousness of discrimination presently faced by members of a classification--the presence of inaccurate stereotyping, the lack of any connection between the classification and the ability of the individual to perform in society--the Supreme Court has also focused on the historical background of that discrimination, to determine whether the class has suffered a history of purposeful discrimination. Homosexuals in the United States have historically been subjected to discrimination both pervasive in its scope and intense in its impact. Rowland v. Mad River Local School Dist. 470 U.S. 1009, 1014 (1985)

(Brennan,J. dissenting from denial of cert.)(homosexuals have been the historical object of "pernicious and sustained hostility".) See also 98 Har. L.Rev.at 1302 (Stigmatization of homosexuals has "persisted throughout history,across cultures,and in the United States"):57 S.Cal.L.Rev.at 824-25 (homosexuals "have historically faced pervasive discrimination" in America). Widespread discrimination against homo sexuals exists in both public and private employment. Developments in the Law-Sexual Orientation and the Law, 102 Har.L.Rev.1508,1554,1575 (1989). Homosexuals must also face discrimination in many other facets of modern life.Id at 1671. In finding jobs, securing housing, in nearly every aspect of social existence,

discrimination on the basis of sexual orientation has been a persistent facet of life in America. The prejudice against homosexuals is "so severe and pervasive that homosexuals are often forced to hide their identities as homosexuals." 31 B.C.L.Rev. at 377.

Unfortunately the deep-seated societal prejudice against homosexuals also evidences itself in widespread violence against homosexuals. One study has found that homosexuals probably face victimization more frequently than any other minority group. P.Finn & T. McNeil, The Response of the Criminal Justice System to Bias Crime: An Exploratory Review, at 2 (1987) Law enforcement officials report that violence against homosexuals is both

significant, and perhaps due to the AIDS epidemic, increasing. See Swisher & Masters, Police, Gay Activists See Rise in Assaults on Homosexuals, Washington Post, Sept. 17, 1989 at A1; Mannery, Anti-Gay Acts in U.S. Widespread, Chicago Tribune June 8, 1990 at 20; Schoolman, Bias crimes Against Gays Increasing in Major U.S. Cities, Reuters, Mar. 6, 1991.

A final consideration used by the Supreme Court in identifying governmental classifications which require heightened scrutiny is whether the class has traditionally been unable to protect the rights of its members through the political process. Heightened scrutiny serves to protect politically powerless minorities or

groups against majoritarian abuses. Special protection is accorded the class under heightened scrutiny analysis because it is unable to secure similar protection through representative government. See Cleburne, 473 U.S. at 441; Plyler, 457 U.S. at 216 n.14; Murgia, 427 U.S. at 313; Rodriguez, 411 U.S. at 28.

One circuit court, in refusing to extend heightened scrutiny to homosexuals, argued that recent legislation in several states indicates that homosexuals are not politically powerless. Citing anti-discrimination provisions in three states, an executive order in New York, and a series of local ordinances, the Ninth Circuit in High Tech Gays, 895 F.2d 574, announced:

"Thus homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation."

As an initial matter, it must be observed that this view is premised on an inaccurate, and exaggerated, view of recent state anti-discrimination legislation. The Ninth Circuit's catalogue of legislative action is taken directly from two footnotes to a recent Harvard University analysis of homosexual rights in America in Developments in the Law--Sexual Orientation and the Law, 102 Har. L. Rev. 1508, 1667 n. 49, & 1668 n. 51 (1989). The court ignored the test which accompanies this section of the Harvard study:

"unfortunately, very little legislation protects gay men and lesbians from discrimination in the private sector. No federal statute bars discrimination by private citizens or organizations on the basis of sexual orientation. Nor do the states provide such protection: only Wisconsin has a comprehensive statute barring such discrimination in employment." Id. at 1667. The Harard study concludes that discrimination against homosexuals is pervasive, and recent changes in the law too inadequate to provide adequate protection. Unless more is done, the study found, "gay men and lesbians will remain unable to conduct their lives free from discrimination." Id. at 1671.

The Ninth Circuit's position in High Tech Gays not only exaggerates the significance of recent anti-discrimination efforts, it suffers from a more fundamental error. It mistakenly assumes that scattered, piecemeal success in local legislation are proof of political power, and hence an invalidation of the use of heightened scrutiny in governmental classifications based on sexual orientation. The standard implicitly adopted by the Ninth Circuit would disqualify every group from suspect or quasi-suspect status. Blacks, women, aliens, or any group which has obtained some form of legislative protection would forfeit the benefits of heightened scrutiny. As Judge Canby has properly observed, the Ninth

Circuit's argument in High Tech Gays is not consistent with the Supreme Court's treatment of other minorities. The existence of isolated, local anti-discrimination successes

> is clearly insufficient to deprive homosexuals of the status of a suspect classification. Compare the situation with that of blacks, who clearly constitute a suspect category for equal protection purposes. Blacks are protected by three federal constitutional amendments, major federal Civil Rights Acts of 1866, 1870, 1871, 1875, (ill-fated though it was) 1957, 1960, 1964, 1965, and 1968, as well as by anti discrimination laws in 48 of the states. By that comparison, and by absolute standards as well, homosexuals are politically powerless.

High Tech Gays v. Defense Clearance Off. 909_F.2d at 378 (Canby, J. Dissenting from denial of rehearing en banc)

In reality, homosexuals face severe limitations on their ability to

protect their interest by means of the political process. As Justice Brennan has observed, "because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." Rowland v. Mad River Local School Dist. 470 U.S. 1014 See also High Tech Gays 909 F. 2d at 378 (homosexuals are regarded as political pariahs" by the major political parties); and Watkins 875 F.2d at 727 (Norris,j. concurring in the judgment) (homosexuals face structural barriers rendering "effective political participation unlikely if not impossible").

There are several factors

which limit effective political action by homosexuals. Due to the harsh penalties imposed by society on persons identified as homosexual, many homosexual persons conceal their sexual orientation. Silence, however, has its cost. It may allow a given individual to escape from the discrimination, abuse, and even violence which is often directed at homosexuals, but it ensures that homosexuals as a group are unheard politically. Moreover, the prejudice that compels many homosexuals to refrain from open political activity also limits access to political power in other ways. By diminishing contact between the heterosexual majority and avowed homosexuals, the majority loses any perspective on concerns in the

homosexual community and is deprived of the resulting sensitivity to those concerns. Politicians seeking to limit the impact of anti-homosexual prejudices through legislation are themselves the target of prejudice. 57 S.Cal. L. Rev. at 825-27.

There is, the court believes, no way to analyze the present issue under the guidelines set down by the Supreme Court and reach any conclusion other than that discrimination based on sexual orientation is inherently suspect. Sexual orientation is not a matter of choice; it is a central and defining aspect of the personality of every individual. Homosexuals have been and remain the subject of invidious discrimination. No other identifiable

minority group faces the dilemma dealt with every day by the homosexual community -- the combination of active and virulent prejudice with the lack of an effective political voice. Only by abandoning the established tests of suspectness, and retreating to some other formulation is it possible to achieve some other result. This court cannot join in such a retreat. Accordingly, the court finds that a governmental classification based on an individual's sexual orientation is inherently suspect.

Rational Basis

For reasons discussed below, the court finds that it is also necessary to discuss the present case in the context of the most permissive standard applicable in equal

protection analysis, the rational basis standard. That is, even assuming there is no suspect class here, the question remains whether there is any rational basis for the consideration of sexual orientation in public employment decision making.

There are special circumstances in which a rational basis for such discrimination has been found. In cases which have refused to apply heightened scrutiny to the defendant's conduct in discriminating against homosexual conduct, a rational basis for the conduct has been found in the need to maintain morale and discipline in the armed forces, Ben-Shalom v. Marsh 881 F.2d 454 (7th Cirt. 1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir.

1989); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980); the requirement for avoiding illegality among law enforcement personnel, Padula v. Webster 822 F.2d 97 (D.C. Cir 1987); and the need to limit the exposure of persons in positions with access to sensitive information to blackmail, High Tech Gays v. Defense Industr. Security Clearance Off. 895 F.2d 575-78 (Department of Defense personnel with secret and top secret security clearance) Padula 822 F.2d at 97 (FBI agent)

Of course, none of those considerations are present here. There is no threat to discipline, no threat of blackmail. Nor, it must be noted, does the defendant even attempt to offer a rational basis for his

alleged discrimination on the basis of sexual orientation.

The defendant's brief, to the extent that it makes any attempt to identify a rational basis for his actions, merely reasserts his denial of any consideration of Jantz's alleged "homosexual tendencies," and contends that the only considerations which affected his decision were legitimate employment factors, such as coaching experience. The problem with this is that it wholly ignores the standards of summary judgment which require the court to assume the truth of Jantz's version of the facts: that Muci refused to hire Jantz because of his perceived homosexual orientation.

This approach was maintained by the defendant during the hearing on

the present motion. Despite repeated invitations by the court, the defendant modestly declined to identify any rational basis for a decision not to hire predicated on Jantz's alleged "homosexual tendencies." The defendant instead used each opportunity extended by the court to retreat into his factual argument, averring that the decision not to hire Jantz had nothing to do with his perceived sexual orientation, and was solely based upon Silverthorne's superior coaching experience.

Assuming, however, that the plaintiff's factual contentions are correct and that the true reason for the refusal to accept Jantz for the teaching position was Muci's

perception of Jantz's "homosexual tendencies," the defendant offers not one word of support to the action. He makes no attempt to defend the consideration of perceived sexual orientation in determining whether to employ an applicant for a public school teaching position. Nor, the court believes, is there any possible rational basis for such discrimination in this day and age.

Homosexual orientation alone does not impair job performance, including the job of teaching public schools. Acanfora v. Board of Educ., 359 F. Supp. at 851 See also Norton v. Macy, 417 F.2d 1161. In Swift v. United States, 649 F. Supp. 596 (D.D.C. 1986) the plaintiff was a stenographer whose job transcribing

presidential speeches and press conferences was terminated when the government revoked his White House security clearance . The government asserted the plaintiff was a "national security risk" and barred him from access to the White House. The district court denied the government's motion to dismiss, finding that the arbitrary discrimination on the basis of sexual orientation would violate the plaintiff's right to equal protection, even without the use of heightened scrutiny:

> Homosexual conduct may not be protected under the right of privacy, and homosexuals may not qualify as a suspect class. Nonetheless, the government may not discriminate against homosexuals for the sake of discrimination or for no reason at all.

649 F. Supp at 602.

This court accordingly concludes that the refusal to hire plaintiff on the basis of his perceived sexual orientation was the result of an action by the defendant which was arbitrary and capricious in nature.

Qualified Immunity

A key point in the defendant's motion for summary judgment, and almost the exclusive point made in the defendant's reply, is that even if there was some wrongful discrimination, the defendant is nonetheless qualifiedly immune. Under the doctrine of qualified immunity, governmental officials performing discretionary functions are shielded from civil damage actions insofar as their conduct does not violate clearly

established statutory or constitutional rights. Harlow v. Fitzgerald 457 U.S.800,818 (1982) Qualified immunity exists unless the plaintiff can demonstrate that the contours of the right allegedly violated by the defendant were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). In response to a claim of qualified immunity, the plaintiff must demonstrate by facts or by allegation both that the defendant violated the law and that the law was clearly established at the time of the violation. Snell v. Tunnell 920 F.2d 673, 696 (10th Cir. 1990); Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642,

646 (10th Cir. 1988).

The defense is not available, however, for discrimination which is purely arbitrary and without any rational basis. As the Tenth Circuit has observed, "when a plaintiff can point to specific facts of defendant's improper motivation, qualified immunity may be inappropriate due to a 'conflict sufficiently material to defendants claim of immunity to require him to stand trial." Snell, 920 F.2d at 696-97 (quoting DeVargas v. Mason & Hanger-Silas Mason Co., 884 F.2d 714, 719 (10th Cir. 1988) (other citations omitted.)

The defendant's argument with regard to qualified immunity is similar to his discussion (or rather lack thereof) relating to rational

basis: he simply argues that he made a good faith professional decision which was not affected by even the slightest consideration of Jantz's alleged homosexuality. But again, the question for the court is whether, assuming Muci's real reason for not hiring Jantz was because of his "homosexual tendencies," Muci is entitled to any qualified immunity defense.

The court finds the answer is no. Certainly when the decision not to hire Jantz was made, homosexual orientation was not established as a suspect class. Muci's actions cannot therefore be tested against whether they were necessary to achieve a compelling governmental objective. Despite the court's conclusion above

that discrimination on the basis of sexual orientation is inherently suspect, that determination cannot support the plaintiff's claim in the present case. At the time of the determination not to hire Jantz, the suspect nature of the classification was not clearly established.

But it had by that time been established, as the district court recognized in Swift, that the government cannot "discriminate for the sake of discrimination." Qualified immunity is no defense where the action of the defendant was not in good faith, was undertaken arbitrarily and without any rational motivation, and motivated instead by a visceral, unreasoning prejudice against homosexuals. See Swift, 649 F. Supp.

at 602. The present case provides no indication of any justification for the defendant's determination to discriminate on the basis of sexual orientation, nor, as the court has noted earlier, has the defendant attempted to supply one. The defendant has not only failed, but has indeed actively avoided attempting to articulate any rational basis for such a decision. Accepting as true the evidence offered by the plaintiff, as the court must under the relevant standards of review, the defendant acted arbitrarily, without any rational purpose, based upon personal prejudices against homosexuals. Under these circumstances, the defendant is not entitled to the defense of qualified immunity.

There are a few other matters present in the case which deserve some brief mention here. The defendant argues, without any great forcefulness, that the plaintiff's constitutional claims should be dismissed since the rights implicated are not stated with precision and clarity. The court finds this argument is without merit. The plaintiff's equal protection claim is stated clearly enough for any reasonable person to understand the nature and context of the grievance asserted and the nature of the right implicated. And certainly, the defendant has no problem in apprehending the nature of the plaintiff's claim and proceeds to discuss the arguments relating to the

plaintiff's equal protection claim in detail elsewhere in his briefs to the court.

The Defendant also argues that the plaintiff's claim against him in his official capacity should be dismissed. The defendant argues that he did not have decision-making authority in job hiring, and therefore is not subject to any liability for actions in his official capacity pursuant to Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989).[6]

---

6 During the hearing of the present matter, the defendant also stressed the relevance of Ware v. Unified School Dist. No. 492, 902 F.2d 815 (10th cir. 1990). In Ware the Tenth Circuit discussed the circumstances under which a school board might be held liable for actions taken by a subordinate official. Of course, the impact of the defendant's argument is limited to the plaintiff's claim against Muci in his official capacity; even if the defendant were correct, it would not eliminate the plaintiff's claim against Muci in his individual capacity. Here, the

The defendant's argument fails in its factual premise. It is correct that the district personnel office does have some input in the hiring process, and yes, the applicants for a job must first meet district-created job qualifications. The principal's discretion in hiring is not unfettered.

Nevertheless, the facts indicate that the decision by the principal is given great weight, and in virtually all circumstances is normally decisive. Ultimate hiring

---

6.plaintiff has brought his claim only against the school official, not the school board. The secondary or derivative liability of the school board is not in issue. The Jett standards used to determine "the responsibility of the school district for the actions of a principal" are relevant only to the actions against Muci in his official capacity. 1005 L.Ed.2d at 628. As noted above, the plaintiff has demonstrated that the defendant is the agent responsible for the determination not to hire.

decisions rarely conflict with the decision of the school principal. More importantly, and aside from considerations relating to the district's hiring policies in general, there is no evidence in the present case that any other officer or agent of the school district participated in any way in the specific decision to hire Silverthorne and not to hire Jantz. The only person demonstrated to have been involved in the decision is the defendant Muci. That failure to interfere with the decision of the principal is wholly consistent with the effective, established policy of the district. The argument that Muci had little to do with the decision not to hire Jantz cannot be accepted in light of the evidence

currently before the court and the relevant standards to be used in resolving the defendant's motion for summary judgment. The plaintiff's equal protection claims against Muci, in both his individual and his official capacities, may proceed.

Finally, the plaintiff also advances claims for invasion of constitutional rights to privacy and freedom of association. Most of the arguments advance by the plaintiff in relation to these claims substantially duplicate those in the plaintiff's equal protection claim. The plaintiff fails to adequately articulate the nature of the asserted privacy and free association claims, and accordingly summary judgment will issue against the same.

IT IS ACCORDINGLY ORDERED

this 29 day of March, 1991, that the defendant's motion for summary judgment (Dkt. No. 21), granted as it relates to the plaintiff's privacy and free association claims; in all other respects, the motion is hereby denied.

/S/ _____
PATRICK F. KELLY, JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VERNON R. JANTZ,
Plaintiff-Appellee

v.

CLEOFAS F. MUCI,
Defendant-Appellant

No. 91-3245

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION OF KANSAS NATIONAL CONFERENCE OF GAY AND LESBIAN ELECTED OFFICIALS,
Amicus Curiae,

ORDER

Filed December 14, 1992

Before McKay, Chief Judge, BARRETT, LOGAN, SEYMORE, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges, and PARKER, District

Judge.*

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. The court having polled on the suggestion for

---

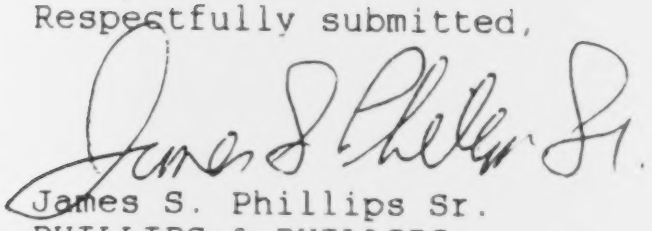
* The Honorable James A. Parker, United States District Judge for the District of New Mexico, sitting by designation.

rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Chief Judge McKay and Judge Seymore would grant rehearing en banc and Judge Logan recusing.

Entered for the Court

/S/ _____
ROBERT L. HOECKER, Clerk

Respectfully submitted,



James S. Phillips Sr.
PHILLIPS & PHILLIPS,
CHARTERED
301 North Main, Suite 1875
Wichita, Kansas 67202
Telephone No (316) 263-4610
Cousel of Record
for Petitioner

Supreme Court, U.S.
FILED
MAY 10 1993
OFFICE OF THE

No. 92-1745

In The

Supreme Court of the United States

October Term, 1992

VERNON R. JANTZ,

Petitioner,

v.

CLEOFAS F. MUCI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID M. RAPP
HINKLE, EBERHART & ELKOURI, L.L.C.
301 North Main, 2000 Epic Center
Wichita, Kansas 67202-4802
316/267-2000

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Was Respondent Entitled To Qualified Immunity Where Petitioner Failed To Demonstrate That Clearly Established Law In 1988 Prohibited Public School Administrators From Denying Teaching Employment Based Upon Homosexuality?

Was Respondent Entitled To Official Immunity Where Kansas Law Vested The Board Of Education With Final Authority To Hire Teachers And Where The Discretionary Recommendations Of School Principals Were Subject To Review By The Board?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THE COURT OF APPEALS' DECISION REQUIRING PETITIONER TO DEMONSTRATE THAT CLEARLY ESTABLISHED LAW PROHIBITED SCHOOL ADMINISTRATORS FROM TAKING PERSONNEL ACTIONS BASED UPON A TEACHER'S HOMOSEXUALITY WAS A CORRECT APPLICATION OF *ANDERSON v. CREIGHTON*, 483 U.S. 635 (1987) AND PRESENTS NO QUESTION MERITING REVIEW .. 3

II. THE COURT OF APPEALS' DECISION FINDING THAT RESPONDENT WAS ENTITLED TO OFFICIAL IMMUNITY SINCE RESPONDENT DID NOT POSSESS FINAL LEGAL OR *DE FACTO* AUTHORITY TO HIRE TEACHERS WAS A CORRECT APPLICATION OF THIS COURT'S PRECEDENTS AND PRESENTS NO QUESTION MERITING REVIEW 14

III. THE QUESTION OF WHETHER HEIGHTENED SCRUTINY APPLIES TO PERSONNEL ACTIONS INVOLVING HOMOSEXUALS IS NOT PRESENTED BY THIS CASE 18

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Adkins v. Board of Educ. of Magoffin County, Ky, 982 F.2d 952 (6th Cir. 1993) 17

Anderson v. Creighton, 483 U.S. 635 (1987) 3, 4, 5, 6, 7, 11, 12, 13

Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) 10

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) 11

Bowers v. Hardwick, 478 U.S. 186 (1986) 9, 10, 11

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 4

City v. St. Louis v. Praprotnick, 485 U.S. 112 (1988) .15, 16

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 4, 5

Hobart v. Board of Educ. of Unified School Dist. No. 309, 230 Kan. 375, 634 P.2d 1088 (1981) 15

Hunter v. Bryant, 112 S. Ct. 534 (1991) 5

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) 14

Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984) 7

Malley v. Briggs, 475 U.S. 335 (1986) 5, 16

McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972) 7

Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992) 9

Mitchell v. Forsyth, 472 U.S. 511 (1985) 9

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 14

TABLE OF AUTHORITIES – Continued

Page

Naragon v. Wharton, 737 F.2d 1403 (5th Cir. 1984) 7

National Gay Task Force v. Board of Education, 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985) 7

Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) 10

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) .15, 16

Pounds v. Griepenstroh, 970 F.2d 338 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1256 (1993) 12

Pritchett v. Alford, 973 F.2d 307 (4th Cir. 1992) 9, 12

Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985) 8, 12

Siegert v. Gilley, 111 S. Ct. 1789 (1991) 13

United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) 4

Ware v. Unified School Dist. No. 492, 902 F.2d 815 (10th Cir. 1990) 15

Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) 10

STATUTES

Kan. Stat. Ann. § 21-3505 11

Kan. Stat. Ann. § 72-8202c 2, 15

No. 92-1745

In The

Supreme Court of the United States

October Term, 1992

VERNON R. JANTZ,

Petitioner,

v.

CLEOFAS F. MUCI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully submits that the decision below properly applied this Court's controlling qualified and official immunity decisions and that the Petition For Writ of Certiorari, presenting no grounds for review, should be denied.

STATEMENT OF THE CASE

The controlling facts are set forth in the opinion of the Court of Appeals and in the Petition. However, since

the Petition misstates certain facts, a brief supplemental recitation is necessary.

Petitioner's statement that school principals are given unchecked discretion and the authority to select teachers in Unified School District No. 259 (U.S.D. No. 259) is expressly contrary to the record. The record showed that teaching applications are first reviewed by the District's Office of Secondary School Personnel to determine compliance with state laws on teacher certification and qualifications. App. B at 45, 96. The applications of those meeting state requirements are then referred to the building principals who, applying district-created job qualifications and guidelines, conduct interviews and make recommendations for hire to the Office of Secondary School Personnel. *Id.* at 96.

Following review at this level, the recommendation is then forwarded to the Superintendent and by him to the Board of Education where it is subject to review by the Board. App. A at 35-36. While a rejection of a principal's recommendation is infrequent, it does indeed occur, the District Court acknowledging that the hiring discretion of principals is not "unfettered" and that such recommendations are periodically disapproved. App. B at 96. Final authority to hire teachers is vested in the respective boards of education under Kansas law. App. A at 32, citing Kan. Stat. Ann. § 72-8202c. Respondent's recommendation to hire petitioner's competitor for the teaching job in issue was, as acknowledged by petitioner, reviewed and approved by the Board here. App. A at 36; Pet. at 28.

The District Court did not address the question of where final policymaking authority for the hiring of

teachers resided under state law and did not hold that respondent possessed such final legal authority. Despite finding that the hiring discretion of principals was not unchecked and that their recommendations were subject to review and approval by the Board, the District Court held that school principals possessed final authority *de facto* since their hiring recommendations were given "great weight" and were usually adopted. App. B at 96-97. Concluding that principals possessed neither final legal authority to hire teachers under Kansas law, or final authority in fact, the Court of Appeals held that U.S.D. No. 259 was entitled to official immunity and reversed the judgment. App. A at 32-37. Petitioner's argumentative mischaracterizations of both the qualified and official immunity holdings of the Court of Appeals are addressed in the body of this brief.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION REQUIRING PETITIONER TO DEMONSTRATE THAT CLEARLY ESTABLISHED LAW PROHIBITED SCHOOL ADMINISTRATORS FROM TAKING PERSONNEL ACTIONS BASED UPON A TEACHER'S HOMOSEXUALITY WAS A CORRECT APPLICATION OF *ANDERSON V. CREIGHTON*, 483 U.S. 635 (1987) AND PRESENTS NO QUESTION MERITING REVIEW.

The decision challenged here is but a routine application of this Court's established qualified immunity doctrine. Adhering to a flawed qualified immunity analysis rejected by the Court of Appeals, petitioner again seeks to

circumvent respondent's qualified immunity by reliance upon general principles of equal protection law, refusing to address the extant law regarding the "right" of homosexuals to nondiscriminatory public school employment. For understandable reasons, petitioner does not contend that the Tenth Circuit's decision conflicts with the decisions of other circuits regarding qualified or official immunity, or homosexual rights. Rather, the Petition contends that the decision below conflicts with the general equal protection principles set forth in *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), declining to discuss the "contours" of the alleged right in terms of the case specific and fact specific analysis required under established qualified immunity doctrine. This approach is flatly contrary to this Court's controlling decision in *Anderson v. Creighton*, 483 U.S. 635 (1987) and presents no basis for invocation of this Court's discretionary jurisdiction.

Petitioner's case ran aground on the threshold requirement to negate respondent's qualified immunity, a demonstration that the right assertedly violated was protected by clearly established law. As recognized by the Court of Appeals, qualified immunity is based upon "the 'objective reasonableness' of the conduct at issue as compared with the state of the law at the time of the alleged violation." App. A at 12, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Under this test, liability may not be imposed upon a public official "unless his conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id.* at 13. The governing test "provides ample protection to all

but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). See also *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991).

As correctly recognized by the Court of Appeals, this Court's analysis in *Anderson* directly applied to petitioner's attempt to negate the qualified immunity defense. This Court there held that the "clearly established" test requires a plaintiff to demonstrate that the particular conduct in issue was prohibited by clearly established law and may not be satisfied by merely identifying a general right, such as due process, and contending that it was somehow violated by a defendant. 483 U.S., at 639. For if the test of " 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*" and would "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability." *Id.* This Court then stated the core requirement for a plaintiff seeking to thwart qualified immunity:

> "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness

must be apparent." *Id.*, at 640 (Citations omitted).

Applying this test to the specific facts presented, this Court held that the mere fact that the right to be free from unreasonable searches was well-established was not sufficient to negate qualified immunity. Vacating the judgment, the *Anderson* Court held that the plaintiff was required to show that a reasonable public official would have known that the very conduct at issue violated clearly established law under the Fourth Amendment. *Id.*, at 640-41. The Court described this analysis as "fact-specific." *Id.*, at 641.

Although contending below that the refusal to hire petitioner constituted class discrimination against homosexuals, petitioner and his *amici* largely declined to discuss the extant case law regarding differential treatment of homosexuals in public employment, relying instead on general equal protection clause cases without relevance to the situation at hand. Describing the right allegedly violated as the "constitutional right to be free from purely arbitrary and irrational discrimination" by government, petitioner's appellate brief was laden with reference to general equal protection cases regarding architects, commercial fishermen, garbage collectors, and other categories without relevance to the particularized constitutional analysis required. (Brief of Appellee at 10, 15-17). Consistently here, petitioner fails to identify or discuss what cases clearly prohibited a public school administrator from considering homosexuality as a factor in a secondary school teaching position or alternatively, what line of case authority specifically established that homosexuals have a clearly established equal protection right to receipt

of teaching employment in the public schools. Rather than discussing applicable law addressing the "rights" of homosexuals to employment in the public schools, the Petition relies upon equal protection decisions involving religious discrimination or discrimination against the mentally retarded. Pet. at 20-21. Petitioner's general identification of his alleged right and his continued refusal to discuss the applicable law is fundamentally at odds with *Anderson's* admonition that the "contours" of the right be clearly established in order to impose liability. 483 U.S., at 640. In express violation of *Anderson*, all that petitioner has done is to identify a general legal test, rational basis equal protection, and allege that it was somehow violated by respondent.

The reason for petitioner's generic exercise is readily apparent. There was no clearly established law in 1988, nor is there even today, providing homosexuals an equal right to teaching employment in the public schools or barring school administrators under the equal protection clause from considering an applicant's homosexual status in the hiring process. To the contrary, the lower courts have repeatedly held that homosexual status or conduct legitimately stands as a disqualification from employment in the public schools. An established line of cases held that discharge of a public school teacher for homosexual conduct was not invidiously discriminatory. *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); *National Gay Task Force v. Board of Education*, 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985). *See also Korf v. Ball State University*, 726 F.2d 1222 (7th Cir. 1984); *Naragon*

v. Wharton, 737 F.2d 1403 (5th Cir. 1984). Of greater significance is the fact that a teacher's discharge based upon her lesbian sexual status was specifically upheld by the Sixth Circuit against a contention that such action violated the equal protection rights of those with a homosexual orientation. *Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985). Examining the case law as it existed in 1988, the Court of Appeals here correctly observed that there was no "clearly established line of authority proscribing an adverse action against civilian job applicants based on homosexual or perceived homosexual orientation." App. A at 23.

As further observed by the Tenth Circuit, Justice Brennan's dissent from denial of certiorari in *Rowland* is particularly relevant to the qualified immunity inquiry here. Characterizing the state of the law in 1985, Justice Brennan noted that "[w]hether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important questions that this Court has never addressed, and which have left lower courts in some disarray." *Rowland*, 470 U.S., at 1015-16. Defining the question presented as whether "a State [may] dismiss a public employee based on her bisexual status alone", Justice Brennan observed that this issue "continues to puzzle lower courts" and characterized the law as "unsettled." *Id.*, at 1009, 1011 and 1018. Although several post-*Rowland* decisions have added to the strength of respondent's position, no subsequent cases were decided prior to the alleged conduct here that "established" the law in petitioner's favor in any manner. Confusion in the

law is the antithesis of a clearly established constitutional right and cannot provide the basis for piercing a defendant's qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985) [Qualified immunity must be found where the question was "open" at the time of defendant's actions]. See also *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992) [Qualified immunity obtains where the law is "unsettled."]; *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992) ["[I]n order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."].[1]

Moreover, petitioner's asserted violation of constitutional rights ignores this Court's holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Hardwick*, this Court addressed the constitutionality of Georgia's sodomy statute challenged as violating a fundamental right of homosexuals to sexual privacy under the Fourteenth Amendment. Observing that sexual conduct by homosexuals had historically been condemned by law and society, the Court succinctly rejected the argument that the espoused right was fundamental or deserving of any protection. Rejecting the argument that the law was without rational basis, the Court held that "the presumed

---

[1] Respondent believes that the established law clearly supports his position. However, the most that petitioner can show, accepting Justice Brennan's assertion, is that some "confusion" exists in the law concerning the public employment rights of homosexuals. Since the controlling issue here is respondent's qualified immunity, such "confusion," if it exists, is of no benefit to petitioner nor a basis for review upon certiorari.

belief of a majority of the electorate in Georgia that homosexual sodomy is immoral" was more than adequate to justify a statute criminalizing the conduct by which the class of homosexuals is defined. *Id.*, at 196. Characterizing *Hardwick*, Justice Scalia has observed that "[m]oral opposition to homosexuality . . . provided [the] rational basis" for the decision. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2468 (1991) (Scalia, J., concurring). Contrary to petitioner's complaint, school administrators entrusted with the solemn task of caring for the Nation's school children are justified under rational basis review in denying teaching employment to homosexuals based upon the very considerations of morality and public policy identified in *Hardwick* and other decisions extant in 1988.

As properly recognized by the Court of Appeals, petitioner's attempt to confine *Hardwick* as a decision solely applicable to substantive due process analysis ignores the obvious doctrinal implications of the decision. Following its announcement, the Courts of Appeals have noted the decision's negative impact upon equal protection rights of homosexuals. *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ["After *Hardwick* it cannot be asserted that discrimination against homosexuals is constitutionally infirm."], *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ["If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class

criminal."].[2] See also *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989). As cogently observed by the Tenth Circuit panel, the precise scope of *Hardwick* need not be determined for qualified immunity purposes here. App. A at 29-30. It is sufficient that the decision and extant appellate holdings demonstrate that respondent's action was not prohibited by clearly established law.[3]

With bare mention of the burden imposed upon him by *Anderson*, petitioner complains that the Court of Appeals, by requiring a showing that discrimination against homosexual job applicants was clearly prohibited, applied an overly constrained application of *Anderson's* particularity test. This is nothing less than an acknowledgement by petitioner that there was no clearly established law condemning adverse public personnel actions

---

[2] Homosexual sodomy is a criminal offense under Kansas law. Kan. Stat. Ann. § 21-3505.

[3] Petitioner's implicit recognition of the shadow cast by *Hardwick* upon his equal protection claim reveals the futility of his argument against qualified immunity. In this regard, petitioner observes that "[t]he decision in *Bowers v. Hardwick*, supra, does not preclude *a finding* that forms of homosexual intimacy not proscribed by sodomy statutes should be subject to the equal protection clause." Pet. at 26 (Emphasis added). But, whatever this Court may *in the future find* regarding the effect of *Hardwick* upon the equal protection rights of homosexuals, such holding could not be retroactively applied to determine respondent's entitlement to qualified immunity in 1988. Petitioner's mere desire for a judicially defined protected status in the future does not translate into an existing well-established constitutional right. Irrespective of *Hardwick*, petitioner had the burden to show that respondent's alleged action was prohibited by clearly established law, a burden he did not carry. *Anderson*, 483 U.S., at 639-40.

against homosexuals as invidiously discriminatory. *Anderson* clearly requires a "fact-specific" inquiry so that a reasonable public official would understand that what he is doing violates that "particularized" right. 483 U.S., at 640-41. Consistent with other circuits, the Court of Appeals' opinion appropriately required a close correspondence between the "clearly established law" and the conduct of a defendant before qualified immunity would be negated. See, e.g., *Pounds v. Griepenstroh*, 970 F.2d 338, 342 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1256 (1993); *Pritchett v. Alford*, 973 F.2d, at 312. While *Anderson* does not invariably require cases addressing the very action in question, 483 U.S., at 640, where closely analogous cases exist, as here, they cannot be ignored in determining the "objective legal reasonableness" of an official's conduct. A public official cannot be found to have violated clearly established law where the most analogous decisions fully support his actions. Petitioner's continued refusal to address *Rowland* and like cases,[4] or to even attempt to demonstrate an established line of authority prohibiting adverse personnel actions against homosexuals, speaks volumes for his claim to a clearly established constitutional right.

At bottom, petitioner's case fails for the most basic of reasons, his threshold failure to demonstrate the existence of a clearly established constitutional right prohibiting the conduct of which he complains. The right which petitioner *seeks to establish*, an unqualified right of homosexuals to equal access to public employment, does not

---

[4] The Petition does not even mention *Rowland* nor Justice Brennan's comments upon denial of certiorari.

exist even today. Petitioner *assumes* that adverse personnel actions against homosexuals are without rational basis in the face of established authority holding that such actions are not invidiously discriminatory under the equal protection clause. Thus, not only has he "failed to allege the violation of a constitutional right that was clearly established at the time of [respondent's] actions, . . . he failed to establish the violation of any constitutional right at all." *Siegert v. Gilley*, 111 S. Ct. 1789, 1794 (1991). Where the most analogous and controlling case law supports the civil rights defendant and where a plaintiff has not attempted to identify any law conferring him constitutional protection under the particular circumstances presented, it is clear that the unlawfulness of respondent's conduct was not "apparent" in light of preexisting law and that qualified immunity fully obtains.

The Petition seeks certiorari review upon a question which it characterizes as "novel." Pet. at 34-35. Such an acknowledgment is antithetical to the standards governing exercise of this Court's certiorari jurisdiction. The Petition points to no divergence of opinion in the lower courts regarding the question of substantive equal protection rights for homosexuals to public employment nor to any split in the Courts of Appeals on the test governing qualified immunity. *Anderson*'s qualified immunity test has been applied on hundreds of occasions since its pronouncement, and the decision here, though involving a background of current social interest, is but a routine application of that test. The Court of Appeals' decision was an eminently correct application of the controlling law and presenting no basis for review, the Petition For Writ of Certiorari should be denied.

II. THE COURT OF APPEALS' DECISION FINDING THAT RESPONDENT WAS ENTITLED TO OFFICIAL IMMUNITY SINCE RESPONDENT DID NOT POSSESS FINAL LEGAL OR DE FACTO AUTHORITY TO HIRE TEACHERS WAS A CORRECT APPLICATION OF THIS COURT'S PRECEDENTS AND PRESENTS NO QUESTION MERITING REVIEW.

The opinion below represents an unquestionably correct application of this Court's official immunity jurisprudence. Reviewing Kansas law, the Court of Appeals held that final authority to hire teachers was vested in the school boards and that school principals were not final policymakers under state law. App. A at 32-33. Reviewing the record, the Court rejected petitioner's argument that principals exercised final hiring authority *de facto*, finding that the undisputed record showed that principals' hiring recommendations were subject to review by the Board of Education and indeed were reversed on occasion by the Board. *Id.* at 34-36. The Court's conclusion that respondent did not possess final *de jure* or *de facto* authority to hire teachers was correct and presents no question meriting review.

The Court below appropriately commenced its analysis by observing that "[s]ection 1983 liability for the single act of an employee may not be imposed on a local government entity under a *respondeat superior* theory" but could be imposed "only if the employee possesses 'final authority' under state law to establish policy with respect to the challenged action." *Id.* at 31, citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 736-38

(1989); *City of St. Louis v. Praprotnick*, 485 U.S. 112, 127 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-84 (1986). The act for which liability is sought to be imposed must be one that "the municipality has officially sanctioned or ordered." *Pembaur*, 475 U.S., at 480. Performing the required state law analysis, the Tenth Circuit held that "final hiring authority in the Kansas school system rests in the school boards" and that "school boards had no statutory authority to delegate hiring authority to subordinates." App. A at 32-33. For this conclusion, the Court relied upon its prior decision in *Ware v. Unified School Dist. No. 492*, 902 F.2d 815, 818 (10th Cir. 1990), citing Kan. Stat. Ann. § 72-8202c (1985) and *Hobart v. Board of Educ. of Unified School Dist. No. 309*, 230 Kan. 375, 634 P.2d 1088, 1094 (1981). *Id.* Petitioner acknowledges the verity of the Court's conclusion that school principals do not possess final hiring authority under state law. Pet. at 11, 28.

Unable to show that principals possess final hiring authority under state law, petitioner instead erroneously contends that the Board delegated its legal hiring authority to respondent in an attempt to connect the Board to the allegedly improper decision. Under petitioner's theory, the failure of the Board to reinvestigate the discretionary decisions of the principal in the hiring process would always constitute delegation, rendering the entity liable. The problems with this approach, as correctly noted by the Court of Appeals, are that it is squarely counter to the controlling precepts established by this Court and is refuted by the record.

At least since *Praprotnik*, it has been well established that "[s]imply going along with discretionary decisions

made by one's subordinates, . . . , is not a delegation to them of the authority to make policy." 485 U.S., at 130. Moreover, "the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority, especially where," as here, "the wrongfulness of the subordinate's decision arises from . . . [an] unstated rationale." *Id.* Petitioner's argument is also expressly contrary to *Pembaur* where the Court addressed a closely analogous immunity claim:

> "[I]f county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board." 475 U.S., at 483 n.12.

Accordingly, the Board's concurrence here in the discretionary hiring recommendation of respondent to hire petitioner's competitor and its failure to reinvestigate the basis for the recommendation did not constitute a delegation of official policymaking authority.

Moreover, as noted by the Court of Appeals, petitioner's argument that principals possessed unfettered *de facto* hiring authority is negated by the record. The undisputed record showed that principals' hiring recommendations were subject to review and were reviewed in fact by the Office of Secondary Personnel, the Superintendent, and the Board, and were periodically reversed. App. A at 34-36; App. B at 96-97. After review of the record, the

District Court found that applicants for a job must "meet district-created job qualifications" and that "[t]he principal's discretion in hiring is not unfettered." App. B at 96. These findings are unchallenged here and directly negate petitioner's delegation argument. Equally significant is petitioner's acknowledgment that the recommendation here was subject to review by the Board and that the decision to hire could only be made by the Board. Pet. at 11, 28.

Applying the controlling precedents of this Court, the Court of Appeals held that respondent did not possess final hiring authority in law or in fact.[5] These conclusions are clearly correct and the decision below presents no basis for review by this Court. The Petition should be denied.

---

[5] In *Adkins v. Board of Educ. of Magoffin County, Ky*, 982 F.2d 952 (6th Cir. 1993), the Sixth Circuit considered very similar facts and issues in holding that the Board of Education and not the superintendent had final policymaking authority under Kentucky law to hire and fire teachers. The Court there found that although the superintendent had the "discretionary authority to make personnel recommendations", such recommendations were subject to review by the Board which possessed final authority under state law. The Court held that the failure of the Board to investigate the superintendent's recommendations did not render the latter a final policymaker. 982 F.2d, at 958-59. These closely similar applications of this Court's precedents demonstrate that no question is presented here meriting review.

III. THE QUESTION OF WHETHER HEIGHTENED SCRUTINY APPLIES TO PERSONNEL ACTIONS INVOLVING HOMOSEXUALS IS NOT PRESENTED BY THIS CASE.

The question of whether classifications affecting homosexuals are subject to heightened scrutiny is not presented by this case. The District Court's decision that homosexual classifications were subject to heightened scrutiny not only broke new ground, but was expressly contrary to the controlling law in its own Circuit. App. A at 8-9, 28. The Court of Appeals appropriately found it unnecessary to reach this issue since, as a matter of law and fact, it was clear that respondent was not a final policymaker in the hiring of teachers. *Id.* at 28. Similarly here, there is no reason for addressing this issue upon certiorari in view of the record and the posture of the case. The Petition alludes to no defined split in the Circuits on this issue, and petitioner's bare desire to have this Court opine on the issue presents no basis for review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

David M. Rapp
Hinkle, Eberhart & Elkouri, L.L.C.
Counsel for Respondent